Dec 29. Argued. Mr. Baxter for appt
& W. Curtis for appellee

Mary b. aff. Feb 5 inst

Read

SUPREME COURT OF THE UNITED STATES.

No. ~~163.~~ 89.

ALEXANDER DUNCAN ET AL., CLAIMANTS OF THE CARGO OF THE SHIP ANNA KIMBALL, APPELLANTS,

vs.

EDMUND KIMBALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 163.

ALEXANDER DUNCAN ET AL., CLAIMANTS OF THE CARGO OF THE SHIP ANNA KIMBALL, APPELLANTS,

vs.

EDMUND KIMBALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print
Libel	1	1
Copy charter party, annexed to libel	3	2
Stipulation for costs	5	3
Stipulation to the action	6	4
Answer	6	5
Motion for monition to assignees of Messrs. Lyman	11	8
Monition to assignees	11	8
Agreed statement of facts	12	9
"A" annexed to statement	14	10
"B" " " "	14	10
"C" " " "	16	11
"D" " " "	17	12
Motion relative to agreed statement of facts	18	12
Decree	18	12
Agreement as to decree	19	13
Prayer for appeal and appeal allowed	19	13
Order to discharge facts agreed	20	14
Agreement qualifying the statement of facts	20	14
Final decree in circuit court	20	14
Claim of appeal	21	15
Deposition of Jerome Merritt	21	15
William P. Lyman	34	24
John R. Kimball	50	35
Charles Marsh	53	37
William S. Rhoades	54	38
John Hurley	57	40
George T. Lyman	62	43
Clerk's certificate	66	45

1 UNITED STATES OF AMERICA, *Massachusetts district, ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-three, before the honorable Nathan Clifford, associate justice.

EDMUND KIMBALL, libellant, appellant,
against
PART OF THE CARGO OF SHIP ANNA KIMBALL, whereof ALEXANDER DUNCAN, WATTS SHERMAN, WILLIAM BUTLER DUNCAN, CHARLES H. DABNEY, and DAVID DUNCAN are claimants. } In admiralty.

The transcript of the record of the district court is as follows, namely:

UNITED STATES OF AMERICA, *Massachusetts district, ss:*

At a special district court of the United States, holden at Boston, within and for the district of Massachusetts, on Monday, the ninth day of May, in the year of our Lord one thousand eight hundred and fifty-nine, before the honorable Peleg Sprague, judge.

EDMUND KIMBALL, libellant,
vs.
A PART OF THE CARGO OF THE SHIP ANNA KIMBALL.

The libel in this case was filed in court on the sixteenth day of March, A. D. 1858, and is as follows, viz:

District court of the United States, March, 1858.

The cargo of the ship Anna Kimball.

MASSACHUSETTS, *ss:*

The libel and complaint of Edmund Kimball, of Wenham, owner of the ship Anna Kimball, *against* certain articles of merchandise hereinafter described, being part of the cargo of said ship, in a cause of contract, civil and maritime.

The libellant alleges and propounds as follows:

First. In July, in the year 1856, the libellant, being owner of said ship, made a certain contract, or charter-party of affreightment, a copy whereof is annexed hereto, to which the libellant craves leave to refer, with Messrs. G. T. & W. P. Lyman, by which the said Lymans, among other things, stipulated and agreed to pay to the libellant the sum of thirty-five thousand seven hundred and fifty dollars, for a round voyage from New York to Melbourne, and thence to Calcutta, and thence to Boston, and by said contract the merchandise, freight or cargo to be laden on board said vessel, on said voyage, became pledged to the libellant for the payment of said sum of money, and the libellant became entitled to a lien thereon by the admiralty and maritime law.

2 Second. That said ship duly performed said voyage, and arrived in Boston with her homeward cargo on board, on the 23d day of January last; that eight thousand dollars of said charter money was paid to the libellant in advance, and a further sum of eight thousand dollars was paid in Melbourne and Calcutta, leaving due the sum of nineteen thousand seven hundred and fifty dollars; that, by the terms of said charter, the said residue was payable one-half in five days, and the rest in ten days after the discharge of the homeward cargo. The said cargo was fully dis-

charged in the course of February last, and that due demand was made by the libellant for the payment of said residue of charter money in five and ten days after said discharge; and although more than ten days have elapsed since said discharge, no part of the said charter money has been paid, either by the said Lymans or their assigns, who claim the said cargo from and under them.

Third. That the said homeward cargo of said ship placed on board by the said Lymans at Calcutta, and duly discharged in Boston, at the times aforesaid, consists of the following articles of merchandise, to wit: 459 bales of gunny cloths; 85 bales of gunny bags; 606 bags of rice; 802 bags of saltpetre; 269 bags of ginger; 4,253 bags of linseed; all being marked H. L. & L, and now lying in the warehouse A A of Ammi C. Lombard, in East Boston.

Fourth. That the libellant has a lien on said merchandise to secure the payment of said residue of charter money.

Fifth. That he is informed and believes that said cargo is claimed by parties in the city of New York, whose agent here is the firm of William F. Weld & Company, of Boston, merchants.

Sixth. That the said ship, having the said cargo with other cargo on board, on her voyage from Calcutta to Boston, met with very severe weather, and was injured by perils of the seas, and was obliged to put into the port of Mauritius, and there to have part of her cargo unladen and repairs done upon her, and was there detained a long time and put to large expenses; that the portion of said expenses which falls upon the cargo named in the third article of this libel, as general average, is the sum of three thousand dollars.

That the libellant has a lien on said cargo for the said sum, and the same has not been paid, or any part thereof.

Seventh. That the premises are within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellant prays that process may issue against the said merchandise, and that all persons having any interest therein may be
3 cited to appear and answer all the matters alleged in this libel, and that the said merchandise may be condemned and sold to pay the said residue of charter money, and the said general average, with interest and costs, and that the libellant may have such other and further relief as he may be entitled to in the premises.

EDMUND KIMBALL.

R. H. Dana, Jr., *Proctor and of Counsel.*

March 16th, 1858.

Mass. District, *ss:*

Sworn to by said Kimball before me.

S. E. SPRAGUE, *Clerk.*

Copy of charter-party annexed to libel.

This charter-party, made and concluded upon in Boston, the fourth day of July, in the year one thousand eight hundred and fifty-six, between Edmund Kimball, managing owner of the ship Anna Kimball, of Beverly, of the burthen of eight hundred and forty-eight tons, or thereabouts, register measurement, now on her passage home, of the first part, and G. T. & W. P. Lyman, of the second part, witnesseth: That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said parties of the second part,

do covenant and agree, on the freighting and chartering of the said vessel unto the said parties of the second part, for a voyage from New York to Melbourne, Australia, thence to Manilla, and back to Boston, or from Melbourne to Calcutta, and back to Boston, with right to deviate, as hereinafter mentioned on the terms following, that is to say:

First. The said party of the first part doth engage that the said vessel in and during the said voyage shall be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such voyage, and also to ballast the ship at Melbourne.

Second. The said party of the first part doth further agree that the whole of said vessel (with the exception of the cabin, and the
4 necessary room for the accommodation of the crew and the storage of the sails, cable, and provisions) shall be at the sole use and disposal of the said parties of the second part, during the voyage aforesaid, and that no goods or merchandise whatever shall be laden on board, otherwise than from the said parties of the second part, or their agent, without their consent, on pain of forfeiture of the amount of freight agreed upon for the same, including the cabin for passengers for the outward voyage only, except the necessary room for the captain and officers of the ship.

Third. The said party of the first part doth further engage to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said parties of the second part or their agents may think proper to ship.

And the said parties of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said party of the first part, do covenant and agree with the said party of the first part, to charter and hire the said vessel as aforesaid, on the terms following, that is to say:

First. The said parties of the second part do engage to provide and furnish to the said vessel, at New York, a full cargo for Melbourne, and the same from Manila or Calcutta to a home port.

Second. The said parties of the second part do further engage to pay to the said party of the first part, or his agent, for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say: Thirty-four thousand seven hundred and fifty dollars for a round voyage from New York to Melbourne, thence to Manila and back to Boston; or thirty-five thousand seven hundred and fifty dollars if to Calcutta and back to Boston; or thirty-seven thousand seven hundred and fifty dollars, and all inward port charges, if to a port of discharge in England. Also, all port charges and pilotage at Manila and Calcutta; also, to advance funds at Manila and Calcutta sufficient for the ordinary disbursements of the ship —sum not to exceed five thousand rupees. Charter payable at Melbourne: all the outward earnings to said port, deducting therefrom eight thousand dollars advanced on account of charter to the owner, in notes payable in six months from date of completion of loading of the ship in New York; owner to pay insurance on said eight thousand dollars. Balance of charter payable one-half in five and one-half in ten days after discharge of homeward cargo.

It is further agreed between the parties to this instrument that the said parties of the second part shall be allowed for the loading and discharging of the vessel at the respective ports aforesaid, lay days as follows, that is to say: Ninety-five running lay days in all at New York, Australia,
5 Manila, and Calcutta; time used in discharging homeward cargo not counted in lay days. Lay days to commence when ship is placed alongside the wharf designated by the charterers, and notice given that she is ready to receive cargo. And in case the vessel is longer detained, the

said parties of the second part agree to pay to the said party of the first part demurrage at the rate of eighty dollars per day, day by day for every day so detained, provided such detention shall happen by default of the said parties of the second part, or their agent.

It is also further understood and agreed that the cargo or cargoes shall be received and delivered within reach of the ship's tackles at the ports of loading and discharging.

It is understood and agreed that the charterers have the right to employ the ship on a monthly charter, on her arrival at Australia, Manilla, or Calcutta, paying therefor at the rate of two thousand dollars per month and all charges, except to victual, and man, and ship's bills; charter to commence same date as round charter, and time so employed not to exceed eighteen months; charter considered earned and payable up to last port heard from, deducting funds advanced abroad. Charterers have the privilege of using a second port in Australia, and in case the second port is used, one thousand dollars is to be paid in addition to the aforementioned sums.

To the true performance of all and every of the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators, and assigns, (especially the said party of the first part, the said vessel, her freight, tackle, and appurtenances, and the said parties of the second part, the freight and merchandise to be laden on board,) each to the other, in the penal sum of forty thousand dollars.

In witness whereof, the said parties have hereunto interchangeably set their hands.

G. T. & W. P. LYMAN.
EDMUND KIMBALL.

Delivered in presence of—
J. MERRITT.

On the thirteenth day of May, A. D. 1858, appeared Alexander Duncan, Watts Sherman, Wm. Butler Duncan, Charles H. Dabney, and David Duncan, all of New York, claimants of said cargo, by Richard Baker, jr., of Dorchester, Mass., their agent and attorney, and produced for sureties said Baker, and Wm. F. Weld, and Wm. G. Weld, and the said claimants, by said attorney; and said Baker, and Wm. F., and Wm. G., submitting
6 themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of two hundred dollars, unto the said libellant, that the said claimants shall pay all costs and expenses which shall be awarded against him in this suit, upon the final adjudication thereof, or by any interlocutory order, whether it be in this or any appellate court.

And on the same day appeared Alexander Duncan, Watts Sherman, Wm. Butler Duncan, Charles H. Dabney, and David Duncan, all of the city of New York, in the southern district of New York, claimants of said cargo, by Richard Baker, jr., their attorney and agent, and produced for sureties said Richard Baker, jr., and Wm. F. Weld, and Wm. G Weld; and said claimants, by their agent and attorney, and said Richard, Wm. F., and Wm. G., submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of twenty-five thousand dollars, unto the said libellant, that the said claimants shall abide by all orders and decrees, interlocutory or final, of the court, and shall pay the amount of the final decree of the court, and all sums of money that they shall be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

And on the said thirteenth day of May, A. D 1858, the following answer was filed in the clerk's office, viz:

Massachusetts district. United States district court. In admiralty.

The answer of Richard Baker, jr., agent of Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan, the owners and claimants of the articles of merchandise, being part of the cargo of the ship Anna Kimball, described in the libel of Edmund Kimball, of Wenham, the owner of said ship, to the libel of said Edmund Kimball against the said part of cargo of said ship.

7 And now comes Richard Baker, jr., of Dorchester, in said district, merchant, the agent of Alexander Duncan, Watts Sherman, William Butler Duncan, Charles H. Dabney, and David Duncan, of the city, county, and State of New York, bankers and copartners, doing business under the name and style of Duncan, Sherman & Company, the owners of the part of the cargo of said ship Anna Kimball, described in said libel of said Edmund Kimball, and for answer to said libel doth allege and propound as follows, to wit:

First. That the said firm of Duncan, Sherman and Company are the true *bona fide* owners of the articles of merchandise being part of the cargo of said ship described in said libel, having title to said merchandise as hereinafter set forth; and that he, the said Richard Baker, jr., is duly authorized by the said Duncan, Sherman and Company to put in a claim in their behalf to the said merchandise in this suit.

Second. That it is true, as alleged in the first article of said libel, that at the time therein alleged, the libellant, being owner of said ship, made a certain contract or charter-party of affreightment with Messrs. G. T. & W. P. Lyman, by which the said Lymans, among other things, stipulated and agreed to pay to the libellant the sum of thirty-five thousand seven hundred and fifty dollars for a round voyage from New York to Melbourne, and thence to Calcutta, and thence to Boston, in the manner and according to the terms of said charter-party, the original of which charter-party this respondent prays the libellant may be required to produce in court, as no copy thereof is annexed to said libel, as alleged in said first article. That this respondent does not admit but denies that by the true construction of said contract or charter-party the merchandise, freight or cargo, to be laden on board said vessel on said voyage, became pledged to the libellant for the payment of said sum of money, and that the libellant became entitled to a lien thereon by the admiralty and maritime law.

Third. In answer to the second article of said libel the respondent says that other merchandise than that set forth in said libel was received on board of said ship on freight at Calcutta, and formed a portion of said homeward cargo, and that said ship did not duly perform said voyage and fully discharge said cargo, inasmuch as she did not bring all of said homeward cargo to said Boston, and there deliver the same in like good order and condition as when shipped on board of her, but that she delivered only a part of said cargo, and that some portion of the part thus delivered was in a damaged condition. That eight thousand dollars of said charter money was paid to the libellant in advance, and a further sum of eighty-two hundred and fifty dollars was paid in Melbourne and Calcutta, and a further sum of ten thousand dollars was paid at said Boston to said libellant by said charterers in the month of August last, and that the said charterers have

8 paid, at the request and on account of the libellant, the further sum of four hundred and fifty dollars and twenty cents for insurance on said advances, and the said libellant has collected and received, and now holds, a part of the freight of said homeward cargo, amounting to about the sum

of seventy-two hundred and ninety-seven dollars and fifty cents, leaving a balance of seventeen hundred and eighty-seven dollars and thirty cents, and no more, which, if the said ship had duly performed said homeward voyage and fully delivered said homeward cargo, which this respondent denies, would remain due and unpaid upon said charter-party.

That by the terms of said charter-party, any residue due under said charter-party was payable one half in five days and the rest in ten days after the discharge of the homeward cargo. That on the arrival of said ship at said Boston, and while the merchandise described in said libel was being discharged, and again after the same was discharged, this respondent, as the agent of said Duncan, Sherman and Company, the owners of said goods, as herein set forth, demanded a delivery of said goods, but the said libellant refused to deliver the same unless the amount alleged in said article to be due and payable on account of said charter-party was paid, and did demand of the respondent payment of the said amount, which the respondent, as such agent, refused to pay, and the libellant has ever since refused to deliver said goods, except upon payment of said amount. And this respondent says that all of said merchandise was discharged on or before the day of February last, and save as aforesaid, he does not admit, but denies, each and every allegation in said second article contained.

Fourth. In answer to the third article of said libel, the respondent says that said Lymans purchased and placed on board said ship at said Calcutta 320 bags ginger, 100 bales of gunny bags, 4,315 bags of linseed, 802 bags of saltpetre, 613 bags of rice, 2,000 pockets of linseed, and 469 bales of gunny cloth, all being marked as alleged in said article; and that of said goods, so placed on board said ship, there were discharged by said ship in Boston only 269 bags of ginger, 85 bales of gunny bags, 4,253 bags of linseed, of which 183 bags were in a damaged condition, 802 bags of saltpetre, 606 bags of rice, 1,751 pockets of linseed, of which 49 were in a damaged state, and 449 bales of gunny cloth; that the goods thus discharged were placed in the said warehouse of said Lombard, and are the articles of merchandise referred to in said article. And the respondent says that the number of bales of gunny cloth so discharged and now lying in said warehouse is 449, and not 459, as incorrectly stated in said libel.

And this respondent alleges that said goods were purchased by the said Lymans by means of credits furnished them by the said Duncan,
9 Sherman and Company, upon an agreement that all goods purchased with such credits should be held by said Duncan, Sherman and Company as their property, and should be shipped under bills of lading consigning them to said Duncan, Sherman and Company, which said bills of lading should be forwarded to, and the same and the goods so shipped should be held by them as aforesaid, until the payment of the amount obtained upon such credits as aforesaid, according to the terms of such agreement. And this respondent avers that said goods, so purchased as aforesaid, were placed on board said ship, and bills of lading of the same were made out, signed, and sent to said Duncan, Sherman and Company, in pursuance with said agreement; and that said merchandise, at the time it was placed on board of said ship, was, and has ever since been, the property of said Duncan, Sherman and Company, subject to be redeemed by the said Lymans, upon the payments of the amounts drawn against the same in making said purchase as aforesaid, according to the terms of said agreement; and that no part of such amount has ever been paid, and that it much exceeds the value of said goods. And save as aforesaid, this respondent does not admit, but denies, each and every allegation in said third article contained.

Fifth. And in answer to the fourth article of said libel, this respondent, upon information and belief, denies that the libellant has any lien upon any

portion of said homeward cargo, for the residue of, or for any portion of said charter money. And he further answers and says, that if the said libellant has a lien on said homeward cargo, or any portion thereof, for the payment of any part of said charter money, which he denies, he has a lien thereon only for the said sum of $1,787 30 remaining unpaid, as hereinafter alleged.

And this respondent, further answering, says that said payment of ten thousand dollars, made on the thirty-first of August last, as hereinbefore alleged, was made by two notes of said Lymans, as shown by the receipt of said Kimball, a copy of which is hereto annexed, which the respondent prays leave to refer to; and he avers that if the receipt of said notes shall not be deemed payment of said amount, on account of said charter money, the contrary of which he alleges, and if but for the receipt of said notes the said libellant would have had a lien on said homeward cargo, or any portion thereof, for the payment of said amount, which he denies, yet the receipt of such notes by said libellant was in effect a waiver of the lien, if any, which he had upon said merchandise for such payment.

And he further avers that if the libellant has any lien upon said merchandise referred to in said article for the payment of any portion of said charter money, which he denies, such lien exists only to the extent of the payment of a reasonable freight for the transportation of said goods from Calcutta to this port, and only in the proportion which such freight bears to the whole freight of said ship in said voyage.

Sixth. That it is true, as alleged in the fifth article of said libel, that the merchandise is claimed by parties in the city of New York, to wit: by said Duncan, Sherman & Company, and that this respondent, a member of said firm of William F. Weld & Company, is the agent of said parties to prosecute their said claim.

Seventh. In answer to the sixth article of said libellant, this respondent admits that said ship met with severe weather, and was obliged to put into Mauritius, and there to have part of her cargo unladen, and repairs done upon her, and was there detained, as alleged in said article. He alleges that the portion of expense which falls upon the merchandise named in the third article of said libel as general average does not amount to three thousand dollars, but only to about twenty-two hundred dollars. That upon the arrival of said ship a general average bond, so called, was signed in behalf said Duncan, Sherman & Company, whereby they became liable to pay the libellant for any claim upon said merchandise, in the nature of general average, and all lien thereon was waived and discharged.

And this respondent says, that as agent of said Duncan, Sherman & Company, he has always been and is now ready and willing to pay any sum as general average which upon a proper adjustment may be found to belong to said merchandise to pay, but that such adjustment has not yet been made and the amount demanded of him.

Eighth. That all and singular the premises are true, in verification whereof, if denied, the respondent craves leave to refer to the depositions and other proofs to be by him exhibited in the cause.

Wherefore the respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

RICH'D BAKER, JR.

THAXTER & BARTLETT, *Proctors for Claimants.*

CIRCUIT COURT U. S., *Mass. Dist., May* 10, 1858.

Sworn to before me.

H. W. FULLER, *Clerk.*

11 *Copy of receipt referred to in the answer.*

BOSTON, *August* 31, 1857.

Received of G. T. & W. P. Lyman their two notes (of $5,000 each) amounting to $10,000, of this date, payable in six months, to my order, on account of charter of ship Anna Kimball. It is understood that this amount is to be insured by G. T. & W. P. Lyman, and charged to owners of ship.

(Signed,) EDMUND KIMBALL.

On the eleventh day of June, A. D. 1858, the following motion for a monition to the assignees of G. T. and William P. Lyman was filed in court, viz:

United States district court, June, 1858.

The Anna Kimball's cargo—Edmund Kimball, libellant.

MASSACHUSETTS, *ss:*

Richard H. Dana, jr., proctor for the libellant, informs this honorable court that Messrs. George T. Lyman and William P. Lyman, named in the libel as purchasers and shippers of the cargo libelled, and as charterers of the vessel, are insolvent, and have had assignees of all their estate appointed under the insolvent laws of Massachusetts, which assignees are Francis Curtis and W. C. Rogers, merchants, doing business in Boston. And that some question may arise whether the said assignees are entitled to certain freight money collected by the libellant from shippers, which the answer claims shall be allowed on account of the charter money, and other questions may arise respecting said charter or freight involving the rights of said assignees, wherefore he prays this honorable court to order special monition to the said assignees to show cause, if any they have, against the prayer of the libel.

RICHARD H. DANA, JR.,
Proctor for Libellant.

Thereupon, by order of the judge, a summons issued commanding the marshal to summon Francis Curtis and W. C. Rogers, merchants, doing business in Boston, the assignees of the estate of George T. Lyman
12 and William P. Lyman, (if they might be found in his precinct,) to appear before the district court of the United States, to be holden at Boston, within and for the Massachusetts district, on Tuesday, the 15th day of June, 1858, at ten o'clock a. m., then and there to show cause, if any they had, against the prayer of the libel of Edmund Kimball against the cargo of the ship Anna Kimball, and to make due return of his doings therein.

On which the marshal made return, vidz:

UNITED STATES OF AMERICA, *Massachusetts district, ss:*

BOSTON, *June* 11, 1858.

Pursuant hereunto I have summoned the within-named Curtis, by giving him in hand a true and attested copy hereof, and on the 12th day of said June I summoned the within-named Rogers, by giving him in hand a like true and attested copy hereof.

WATSON FREEMAN,
U. S. Marshal.

Agreed statement of facts.

The following is an agreed statement of facts used in the hearing of this cause in this court on the 20th day of October, A. D. 1858, vidz:

United States district court, July, 1858.

The Anna Kimball's cargo—Edmund Kimball, libellant; Alexander Duncan et als., claimants.

MASSACHUSETTS, *ss:*

The following facts are agreed between the parties for the purposes of the trial of this cause:

Of the charter money, $8,000 was paid in advance, in the manner stated in the charter-party, and $8,250 was paid in Australia and Calcutta.

AUGUST 31ST, 1857.

On application of the libellant for the purpose named in the receipt, he received from the Messrs. Lyman two notes of $5,000 of that date, on six months, payable to his order, and gave therefor the receipt, a copy of which is annexed and marked "A." The libellant procured these notes
13 to use, and did obtain money upon one of them at a bank where he was a director, and where he had a standing account. The Messrs. Lyman effected insurance on these amounts, in pursuance of the agreement, paying therefor $415 20. In the autumn of 1857 the Messrs. Lyman failed, and on the 19th day of January took the benefit of the Massachusetts insolvent law, the first publication of notice being on that day. After the failure, and before the publication of notice, the libellant tendered them back their said notes, and they refused to receive them, and the libellant has been always ready to give up said notes.

The contract between the Messrs. Lyman and the claimants was in writing, and a copy thereof is annexed, marked B.

The ship was in charge of Mr. James H. Adams in Calcutta, the agent of the Messrs. Lyman, and the cargo libelled was purchased by him upon the credits furnished by the claimants, and shipped, and the bills of lading therefor were drawn and sent in pursuance of said agreement, the bills of lading being of the form a duplicate whereof is annexed, and marked C.

Other cargo was taken on board, the property of sub-freighters, at specific rates of freight, and bills of lading given therefor of the form annexed, and marked D.

The vessel arrived in Boston on the 23d January, 1858, having been expected, when the said notes were given, to arrive in about three or four months.

The libellant has collected the freight due from the sub-freighters, amounting to about $7,000, the exact amount of which is to be ascertained and deducted from the charter.

On the arrival of the ship and discharge of the cargo, the claimants made due demand for the cargo under said bills of lading, and the libellant refused to it, claiming a lien thereon for all the unpaid charter money, deducting the sub-freight collected, but not deducting the said notes of $10,000. The claimants were willing to pay the balance of charter money, for the purpose of getting possession, if the libellant would allow the said $10,000, but no offer was made to pay said balance unless the libellant yielded his claim to the $10,000.

The cargo was libelled after the expiration of ten days from its discharge,

and on satisfactory stipulation being given in the cause for the demand and costs, it was delivered to the claimants, without prejudice to the rights or claims of either party.

The libellant tenders the said notes in court.

If the libellant recovers, and the claimants so desire, the question of deduction for short cargo shall be open and sent to a commissioner. The claimants have not received enough from the cargo to pay their advances.

14 A.

BOSTON, *August* 31, 1857.

Received of G. T. & W. P. Lyman their two notes of ($5,000 each,) amounting to ten thousand dollars, of this date, payable in six months, to my order, on account of charter of ship Anna Kimball. It is understood that this amount is to be insured by G. T. & W. P. Lyman, and charged to owners of ship.

(Signed) EDMUND KIMBALL.

B.

No. 1163. OFFICE OF DUNCAN, SHERMAN & CO., BANKERS,
New York, March 30, 1857.

Messrs. GEORGE PEABODY & Co., London:

GENTLEMEN: We hereby authorize Mr. James H. Adams or Messrs. Anshootos, Day & Co., of Calcutta, or any other parties whose drafts you may be directed by the written order of the said James H. Adams or Anshootos, Day & Co. to accept under this credit, to *value* on you at six months' sight, for account of Messrs. George T. & W. P. Lyman, of Boston, for any sum not exceeding twelve thousand pounds sterling, to be used as he or they may direct for fair invoice cost of goods or merchandise, to be purchased for account of whom it may concern, and to be shipped to the port of New York or Boston by vessel or vessels.

The bills must be drawn in Calcutta or any port east of the Cape of Good Hope prior to the first day of April, 1858, and advice thereof given to you, accompanied by invoices and bills of lading, to our order, for the property shipped as above. Duplicates, invoices and bills of lading to be forwarded by the vessel, under cover, to us.

It is distinctly understood that the shipping documents above mentioned are to be delivered to you prior to your acceptance of any draft or drafts under this credit, without which you will not consider yourselves authorized to accept any draft or drafts by virtue hereof.

15 And we do hereby agree with the drawers, endorsers, and bona fide holders of bills, drawn in compliance with the terms of this credit, that the same shall be duly honored on presentation at your office in London.

For £12,000.

Very respectfully, your ob't servants.

Please sign bills as being drawn under credit.
No. 1163, dated March 30, '57.

N. B.—All the bills of lading are to be forwarded to Messrs. Geo. Peabody & Co., (by successive conveyance,) except the one retained by the captain of the vessel, and the duplicate invoice and bill of lading by the vessel, under cover, to us.

Insurance on order at New York at Boston.

NEW YORK, *March* 30, 1857.

MESSRS. DUNCAN, SHERMAN & CO.:

GENTLEMEN: Having received from you the letter of credit, of which a true copy is on the other side, we hereby agree to its terms, and in consideration thereof we bind ourselves to accept, on presentation, the drafts of Messrs. George Peabody & Co., or your own, payable at five months from the date of Messrs. George Peabody & Co.'s acceptances, under said credit, for the amount of such acceptances; to give you satisfactory security for their payment, if required, and to pay them at maturity, either in sterling bills payable at sixty days' sight in London, endorsed by us and approved by you, or in dollars at the rate of exchange at which you may be drawing at the time of such payment, with commission on the amount of this credit of two per cent. And we hereby give you a specific claim and lien on all goods or merchandise and the proceeds thereof, in respect of which Messrs. George Peabody & Co. may come under any engagements, under said credit, on all policies of insurance on such goods or merchandise, which we hereby agree to effect, or cause to be effected, to an amount sufficient to cover the credit, and on all bills of lading given for said goods or merchandise, with full power and authority to take possession and dispose of the same at discretion.

And we also agree that you may reject any bills, however good, if you have at the time your limited amount running on the drawees, and that in all payments or settlements made or arising under this credit the pound sterling shall be calculated at the current rate of exchange in New York on London existing at the time of such settlement, and interest charged at bank rate if over five per cent. It being understood that remittances made in bills drawn by you, or moneys paid to you, shall be taken as payment without recourse.

16 Any new credits which may be granted shall be considered under this agreement and on the basis thereof, with such variations as may be arranged, together with one-tenth of one per cent. for stamp duty on bills of exchange, imposed by the laws of Great Britain.

(Sign) GEO. T. & W. P. LYMAN.

C.

Shipped in good order and condition, by James H. Adams, for account and risk of Messrs. Geo. T. & W. P. Lyman, of Boston, in and upon the good ship or vessel called the Anna Kimball, whereof Captain T. B. Rennell is master for this present voyage, and now lying in the river Hoogly, and bound for Boston:

Tons.	Ft.	In.			
340	1	0	L & L $ e 189 } A K 191 e 470 }	469 bales.	Four hundred and sixty-nine bales g'y cloth.
37	20	0	" $1-2	100 "	One hundred bales g'y bags.
34	6	7	"	2,000 pkts.	Two thousand pockets linseed.
29	33	0	"	320 bags.	Three hundred and twenty bags ginger.
441 e	20	7			

Being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of Boston, (all and every the dangers and accidents of the seas and navigation, of whatsoever nature or kind, excepted,) unto the order of Messrs. Duncan, Sherman & Co., or to

their assigns, he or they paying freight for the said goods,
Capt'n copy. as per charter-party, without primage and average accustomed.

In witness whereof, the master of the said ship or vessel hath affirmed
17 to five bills of lading, all of this tenor and date, one of which being accomplished, the rest to stand void.

Dated in Calcutta this 7th day of August, 1857.

Weight and contents unknown to—

(Signed) T. B. RENNEL.

D.

Shipped in good order and condition, by Willam S. Wilmer, on board the good ship called the Anna Kimball, whereof T. B. Rennell is master for the present voyage, now lying in the port of Calcutta and bound for Boston, to say :

14
13
—
42
14
—

Eighteen chests indigo..... 182

L & W

Being marked and numbered as in the margin, and are to
I No. 205—222 be delivered in like good order and condition at the aforesaid port of Boston, (the danger of the seas only excepted,)
Tons 3 13 9 unto Messrs. Lowber & Wilmer, or to assigns, he or they paying freight for the said goods, fourteen dollars per ton of 40 cubic feet.

In witness whereof, the master of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which bills being
18 accomplished, the others to stand void.

(Signed) T. B. RENNELL.

Dated at Calcutta, 27th July, 1857.

On the 11th day of May, A. D. 1857, the following motion, relative to the foregoing agreed statement, was filed in court, viz:

May, 1859.

The Anna Kimball's cargo.

MASSACHUSETTS, *ss:*

The libellant prays the judgment of the court that the document entitled "Agreed statement of facts" is not part of the record, and should not be certified as such to the circuit court.

Also that the said statement be discharged, on the ground that he has discovered that several material facts therein agreed are not correct in fact, and prays leave to refer to affidavits and other proofs in support of said motion.

R. H. DANA, JR., *Proctor.*

And thereupon the court declined to entertain the motion to discharge the agreed statement, because it came too late, being after the decree.

This libel was filed and entered at a special district court held on the sixteenth day of March, A. D. 1858, and thence was continued from time to time to this ninth day of May, A. D. 1859; and now, after a full hearing of the cause, upon the facts proved and arguments of counsel and mature deliberation thereon had, the court doth order, adjudge, and decree that the said libellant recover against the aforesaid part of the cargo of the ship Anna Kimball (the subject of this suit) the sum of two thousand five hundred dollars, without costs to either party.

19 The following agreement having been filed in court on the ninth day of May, A. D. 1859, viz:

United States district court, May, 1859. E. Kimball, libellant; Duncan and *al.*, claimants.

MASSACHUSETTS, *ss:*

It is agreed that the amount of the decree, under the decision of the court, shall be two thousand five hundred dollars, and on appeal in the circuit court, or Supreme Court, either party shall have the right to have the case sent to an assessor to determine the exact amount of the decree, if it be sustained, this amount being agreed upon for the purpose of appeal.

RICHARD H. DANA, JR., *for Libellants.*
THAXTER & BARTLETT, *for Claimant.*

On the 14th day of May, A. D. 1859, the following prayer for an appeal from the foregoing decree was filed in court, viz:

United States district court, March term, 1859.

The Anna Kimball's cargo.

MASSACHUSETTS, *ss:*

The libellant claims an appeal from the decree of this court in the above cause, and prays that the appeal be allowed.

By his proctor:

R. H. DANA, JR.

And the court allowed his appeal as prayed for.

I, S. E. Sprague, clerk of the district court of the United States for the district of Massachusetts, do hereby certify that the foregoing is a true transcript of the record of this court in said cause.

In witness whereof, I have hereunto set my hand and affixed the seal of this court this sixteenth day of May, A. D. one thousand eight hundred and fifty-nine. [L. S.]

Attest: S. E. SPRAGUE, *Clerk.*

This appeal was entered in this circuit court of the United States, at the May term thereof, in the year of our Lord eighteen hundred and fifty-nine, when and where the parties respectively appear, by their respective proctors above mentioned; and the cause was thence continued from term to term to the October term, A. D. 1860, when the said appellant is granted leave to take further proofs. And the following order to discharge
20 facts agreed, was entered:

Circuit court U. S., Oct. T., 1860, to wit, Nov. 12.

MASSACHUSETTS DISTRICT, *ss:*

On motion of R. H. Dana, jr., proctor for the libellant, and after hearing of the parties had thereon, it is ordered by the court that the agreed statement of facts in this cause be, and the same are hereby, discharged upon the condition that the libellant pays to the claimants all taxable costs up to this time and takes none in case his appeal shall be finally sustained.

The cause was thence continued to the May term, A. D. 1861, when the following agreement qualifying the statement of facts was filed:

Mass. district, U. S. circuit court, May T., 1861. Duncan, Sherman & Co., claimants.

EDMUND KIMBALL *et al.*
vs.
CARGO OF ANNA KIMBALL.

The "agreed facts" upon which the case was heard by the district judge having been discharged by order of court, it is agreed that all of said agreed facts are correct, and may be used by either party as such, except the statement therein on page 26 of the record, at the foot, "having been expected, when the said notes were given, to arrive in about three or four months," which statement has been discharged from the agreed facts.

Agreed to, on condition that no objection or delay be interposed to prevent the printing of the record and hearing of the case in its order at the opening of the Oct. term.

R. H. DANA, JR., *for Libellant.*
THAXTER & BARTLETT, *for Claimant.*

The cause was thence continued to the October term of this court, A. D. 1861, when the same was fully heard and argued by the respective proctors; the same was thence continued from term to term to this present term; and now the court enter the following final decree therein: "This cause came on to be heard at the October term of this court, A. D. 1861, and was argued by counsel. The same was thence continued from term to term to this present term. And now, after mature deliberation thereon had, it is here ordered, adjudged, and decreed by this court, that the decree of the district court in this cause be, and the same is hereby, reversed; and that the libellant, Edmund Kimball, recover against the said articles of merchandise, being the part of the cargo of the said ship, specified and described in the said libel—as and for the residue of the charter money and general average due to him and damages—the sum of sixteen thousand six hundred thirty-one dollars and fifty-nine cents, together with his costs of suit, taxed at one hundred ninety-eight dollars and fifteen cents; and that the said articles of merchandise be, and the same are hereby, condemned therefor. And it is further ordered that if the said sum of sixteen thousand six hundred thirty-one dollars and fifty-nine cents and costs, taxed as aforesaid, shall not be paid within ten days after notice of this decree, then, and in such case, execution is to issue against the stipulators in the case therefor."

21 And thereupon, in open court, (to wit, on the twenty-fourth day of October, 1863,) the said claimants file their claim of appeal in the words following, to wit:

The above-named respondents considering themselves aggrieved by the final decree entered on the twenty-fourth day of October, 1863, in the above-entitled cause, do hereby appeal therefrom to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the said Supreme Court.

THAXTER & BARTLETT,
Proctors for the Respondents, claimants.

And said claimants give good and sufficient security to prosecute their said appeal with effect, and to pay all damages and costs if they shall fail to make the same good; which security is approved by the court, and the said appeal is accordingly allowed, (to wit, Oct. 24, 1863.)

A true record. Attest:

H. W. FULLER, *Clerk.*

Evidence in behalf of libellants.

Circuit court of the United States for the district of Massachusetts.

EDMUND KIMBALL
vs.
CARGO OF SHIP ANNA KIMBALL. } Duncan, Sherman & Co., claimants.

UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

Be it remembered that, on the 19th and 20th days of December, in the year of our Lord eighteen hundred and sixty, at Boston, in said district of Massachusetts, before me, George D. Guild, a commissioner in and for the district of Massachusetts, to take affidavits and bail in civil causes depending in the courts of the United States, for the first circuit, under the acts of Congress in such case made and provided, personally appeared Jerome Merritt and William P. Lyman, witnesses for the libellant in a certain libel depending in the circuit court of the United States in and for the circuit and district of Massachusetts, wherein the parties above named are respectively libellant and respondent; and the said Merritt and Lyman, being by me first carefully examined and cautioned and sworn to testify the *whole* truth relative to the issue, did depose and say, in answer to interrogatories proposed to him, as follows, viz:

The testimony of Jerome Merritt, of Boston.

1st interrogatory. Are you a ship broker in Boston? And how long have you been so?

Answer. I am; and have been 15 years, or thereabout.

22 2d int. Has your business made you acquainted with Calcutta voyages, their usual length according to the qualities of vessels, and the usual times of delay there?

Ans. It has.

3d int. Do you know the ship Anna Kimball, and her sailing qualities?

Ans. I do.

4th int. Were you employed by Mr. Edmund Kimball, the owner of the ship A. Kimball, in August, 1857, to make an arrangement between him and the Messrs. G. T. & W. P. Lyman?

(Objected to.)

Ans. I was.

5th int. Did you make any arrangement with them? If yea, please to state what it was, fully and particularly.

Ans. I made an arrangement with Messrs. Lyman for their notes to the amount of ten thousand dollars, to fall due about the time that the ship would arrive, as we supposed, should she come directly home. The notes were for Mr. Kimball's accommodation, and were to be held over or renewed should they fall due before the arrival of the ship.

6th int. At what date was this arrangement made?

Ans. The latter part of the summer of 1857.

7th int. With reference to the date of giving the notes, when was the arrangement made; before or after, or at the time the notes were given?

Ans. At the time.

8th int. At that time what did you know respecting the position and prospects of the ship Anna Kimball?

Ans. She was at Calcutta, or about due there; I don't recollect whether she was in port.

9th int. How long did it then take for the mails for Calcutta?

Ans. About 60 days.

10th int. If a ship like the A. Kimball arrived in Calcutta about the 1st of July, and was to take a usual cargo home, under a charter here in the usual manner, how long time would you allow for her to be there, judging from probabilities?

Ans. From 50 to 60 days.

11th int. How long time would you allow for the passage of such a ship as the A. Kimball from Calcutta to Boston, supposing her to sail about the 1st of September?

Ans. Well, at that season of the year, 150 days is a fair passage.

12th int. Supposing such a ship as the Anna Kimball to arrive in Boston with a Calcutta cargo in January or February, how long time would you allow between the day of her arrival and the final discharge of her
23 cargo, having reference to chances of weather, length of days, custom-house rules, &c.?

(Objected to.)

Ans. I should not consider 30 days a long time. If we had fair weather all the time, we could do it sooner. I should be willing to compromise for 30 days at that season.

13th int. Supposing that, on the 31st of August, you knew that a ship like the Anna Kimball had arrived at Calcutta about the 1st of July, was to take in a cargo for Boston under charter, and to return here, and to discharge her cargo here, about what date, or rather what dates, would you allow for the final discharge of her cargo, taking the usual risks?

(Objected to.)

Ans. I should say between seven and a half and eight months—60 days at Calcutta, 5 months home, and one month to discharge.

14th int. At the time you made the arrangement with Messrs. Lyman how did you learn the condition and prospects of the ship at the latest advices?

(Objected to.)

Ans. I can't say whether I got the information from the Messrs. Lyman or from Mr. Kimball.

15th int. Please to state all the conversation you had with the Messrs. Lyman, or either of them, as agent for Mr. Kimball upon this subject, to the best of your recollection.

(Objected to.)

Ans. Messrs. Lyman applied to me for an amendment of their charter of another ship, the Belle of the Sea, which amendment was an additional clause for a monthly charter; Mr. Kimball granted their wishes, or concluded to add that clause, provided Messrs. Lyman would accommodate Mr. Kimball with their notes with reference to the Anna Kimball's charter, which they agreed to do. That is the substance of the negotiation.

16th int. You have stated what the arrangement was in case the ship should not have arrived when the notes fell due. Please to state whether there was any arrangement, and if so, what, in case the ship arrived so early that the cargo would be discharged before the notes fell due.

(Objected to, for form and substance.)

Ans. I don't recollect of any arrangement.

17th int. Was there anything arranged, and what, as to whether the notes should or should not be considered as payment?

(Objected to, form and substance.)

Ans. It was supposed the notes would fall due about the time of the arrival of the vessel. If the notes fell due about the time of the arrival
24 of the vessel, it is presumed they would have been paid on account of freight. There was no distinct understanding about it. (Answer objected to as stating suppositions and presumptions, and not facts.)

18th int. I did not mean to inquire about the payment of the notes, but as to whether the giving of the notes was to be treated as payment to that extent of the charter money due from the Lymans to Mr. Kimball.

(Objected to, form and substance.)

Ans. I think I have already stated that the notes were for Mr. Kimball's accommodation; that the notes were not considered as payment of the charter. The notes were not considered as payment of the charter, because they were to be held over and renewed till the payment of the charter became due. (Objected to so much of the answer as states inference and not facts.)

19th int. If you have stated all you recollect, please to state whether there was or was not any agreement or understanding to the effect that the notes should be treated as payment of the charter.

(Objected to, form and substance.)

Ans. My impression is, that not unless the notes matured about the time the freight money became due. That is my impression. I don't recollect exactly.

20th int. If you have stated all you now recollect, let me call your attention to the subject of the lien of Mr. Kimball on the cargo. Was there any arrangement or understanding on that point, how it was to be affected by the notes, if at all? And if so, what?

(Objected to, form and substance.)

Ans. I don't recollect that there was any arrangement about it.

21st int. Was there any arrangement or understanding that Mr. Kimball should waive his lien or abandon it in any way by taking the notes?

(Objected to, form and substance.)

Ans. There was not.

22d int. If there had been a proposal on either side that the lien should be waived or abandoned by taking the notes, do you think you should remember it?

(Objected to, form and substance.)

Ans. I should.

23d int. If there had been an arrangement that the taking of the notes should be treated as payment of the charter money, do you think you should remember it?

(Objected to, form and substance.)

Ans. I think I should.

25 24th int. If there was any conversation as to the time for which the notes should be given, please to state it to the best of your recollection.

(Objected to.)

Ans. Six months was the time. That is the best of my recollection.

Ans. In my counting-room.

28 24th cross-int. And did you not make out the alterations then, when he was there, or just after he left, and before you saw the Lymans?

Ans. I don't remember. It is a broker's business to make the alterations and submit them to the principals.

25th cross int. What is your best recollection as to the question last put to you?

Ans. I have nothing to add to my last answer.

26th cross-int. You knew at the time you applied to Mr. Kimball what alterations the Lymans wanted, did you not?

Ans. I did.

27th cross-int. Was there anything there for you to submit to the Messrs. Lyman, for consideration about the alterations?

Ans. A memorandum is always submitted and corrected, if necessary.

28th cross-int. Did you see the Messrs. Lyman after you saw Kimball, and before you submitted to them the memorandum of the alteration?

Ans. I don't remember; probably back and forth half a dozen times.

29th cross-int. About this affair, or others?

Ans. This affair.

30th cross-int. Have you any recollection of going once between the times referred to?

Ans. I have no distinct recollection. It is usual to see the parties once, twice, or three times, before everything is understood.

31st cross-int. Which of the Messrs. Lyman applied to you to get this alteration?

Ans. They were both in counting-room. I think George T. was the one that did the talking.

32d cross-int. Do you mean that both came to your office about this?

Ans. I think they sent for me. It was in their counting-room that the application was made.

33d cross-int. Do you remember whether you had more than one conversation with the Lymans before you applied to Kimball?

Ans. I don't remember.

34th cross-int. Which of the Messrs. Lyman had the most to say and do about this whole business?

Ans. Probably George T., but I am not sure in this case.

35th cross-int. When did you first apply to them for the notes?

Ans. It may have been some days, a week, more or less, before the notes were given.

29 36th cross-int. What did you say to them about the notes? State fully, in the exact words, or if you cannot in the exact words, then in substance, all that was said between you about these notes.

Ans. I have already stated all I have to say. I carried through the negotiation about the charter and these notes.

Question repeated.

Ans. I cannot recollect anything more than I have already stated, in exact words or in substance, three years ago

37th cross-int. Will you swear that anything was said either by you, or by either of the Messrs. Lyman, as to when the freight would be due?

Ans. I don't remember what was said.

38th cross-int. Will you swear that anything was said by either you, or either of the Messrs. Lyman, about fixing the time when the notes should mature, with reference to when the freight would fall due?

Ans. The maturity of the notes and the arrival of the vessel was in all probability discussed, and calculated that the notes would fall due about the time of the arrival of the vessel; but I don't recollect distinctly about it; I don't recollect the words.

39th cross-int. Will you swear that you now have a recollection that it was discussed, or that any such thing was said?

(Objected to, as assuming what has not been said.)

Ans. I will not swear.

40th cross-int. Have you not stated to me and others, about the time this suit was first commenced, that the reasons you gave to the Messrs. Lyman, as an inducement for them to give their notes, was that they would thereby get a longer credit?

(Objected to)

Ans. I don't recollect.

41st cross-int. Will you say that you did not so state to me and to Mr. Baker?

Ans. I will not say so. I don't think I did.

42d cross-int. Do you remember the fact of my applying to you, and of Mr. Baker's applying to you, to learn the facts in regard to the giving of these notes, about the time this suit was brought?

Ans. I have no recollection of it. I have an indistinct recollection of Mr. Baker's taking me somewhere to see somebody; but when, where, or about what, I have no recollection.

43d cross-int. Can you now say whether Mr. Kimball told you where the Anna Kimball was before these notes were given?

Ans. I cannot say.

44th cross-int. Will you swear that you now recollect that you then knew where she was?

30 Ans. I will not; probably I did then know where she was, or where she ought to be.

45th cross-int. Were not the Lymans in good credit then?

Ans. They were.

46th cross-int. Did one word pass between you and Mr. Kimball about fixing the notes so as to preserve his lien for freight?

Ans. Not to my recollection.

47th cross-int. Did one word pass between you and either of the Messrs. Lyman about fixing the notes so as not to offset or to affect the lien of Mr. Kimball for his freight or charter money?

Ans. There was nothing said about it, to my knowledge.

48th cross-int. Can you say that you didn't at once, on making the application to the Messrs. Lyman, say to them that Mr. Kimball wanted to get their notes for ten thousand dollars on six months, on account of the charter of the Anna Kimball?

Ans. I may have said so. The notes were to be accommodation notes, but they were not to be as part payment unless they were paid.

49th cross-int. Will you swear that you now recollect that either you or either of the Messrs. Lymans said they were to be accommodation notes?

Ans. They were for Mr. Kimball's accommodation. The fact is, without reference to my testimony, the notes were given for Mr. Kimball's temporary accommodation. They were not discounted, but could have been cancelled at any time.

(Mr. Thaxter objects to the whole answer as irresponsive and incompetent.)

Question repeated.

Ans. I don't think those exact words were used.

50th cross-int. Will you swear that you now recollect that anything was said by either you or the Messrs. Lymans about the notes being or not being in payment or part payment?

Ans. I will not swear.

51st cross-int. Will you swear that you now recollect that anything was

said by either you or the Messrs. Lymans as to the effect these notes would have upon the charter money?

Ans. I don't recollect that anything was said on the subject.

52d cross-int. Will you swear that you now recollect that there was any discussion, or any question between you and the Messrs. Lyman, as to how long these notes were to run?

Ans. I have no distinct recollection.

53d cross-int. Will you swear that any such discussion was had?

Ans. No, sir.

54th cross-int. Have you any recollection now that anything was said between the Messrs. Lyman and you about where the ship was or when she would arrive here?

31 Ans. I have no recollection. I have answered that question before. The probability is the matter was discussed, but I have no recollection.

55th cross-int. Will you swear that you now recollect that one word passed between you and Mr. Kimball about fixing the time the notes were to run, with reference to the time when the charter money would fall due?

Ans. I do not recollect any conversation on the subject. The understanding at the time, as near as I can recollect, was that one would meet the other. (Last part of answer objected to as irresponsive and incompetent.)

56th cross-int. Will you swear that there was one word said about it?

Ans. I will not.

57th cross-int. Did you carry on the whole negotiation for these notes with the Messrs. Lymans, or did any one else aid?

Ans. I think it was carried on through me. I don't know who could have assisted me. I have no partner.

58th cross-int. Did Mr. Kimball have anything to do with the Lymans about it?

Ans. I think they had an interview, one or more.

59th cross-int. Were you present?

Ans. If I was, I have no recollection of what passed.

60th cross-int. Are you certain that Mr. Kimball did see them about the matter?

Ans. Not certain, but I think he did. I think Mr. William Lyman had an interview with Mr. Kimball.

61st cross-int. How many interviews do you recollect you had with the Messrs. Lyman about getting these notes?

Ans. I do not recollect.

62d cross-int. Can you say you recollect more than one interview?

Ans. Yes, sir, certainly; in all probability more than one.

63d cross-int. Do you remember whether the Messrs. Lyman expressed any reluctance or objection to giving these notes?

Ans. I think they did not, or not much; as a matter of course they would prefer not to.

64th cross-int. Prior to August, 1857, what had you known of the Anna Kimball?

Ans. I had chartered her once or twice, I think, previous to that time.

65th cross-int. Had you prior to that time seen her?

Ans. Yes, sir.

66th cross-int. How old was she?

32 Ans. At that time, I should think, about six.

67th cross-int. Had you ever chartered her on an East India voyage before this charter in this case?

Ans. I had.

68th cross-int. How many times?

Ans. Well, once certain.

69th cross-int. When? How long before this?

Ans. Just previous to this voyage.

70th cross-int. Who was her captain on this voyage?

Ans. T. B. Rennell.

71st cross-int. Have you ever been engaged in the Calcutta or East India trade?

Ans. I have not.

72d cross-int. Have you ever been engaged in shipping as a ship-owner, or otherwise than as a ship broker?

Ans. Yes, I have, as owner of brig, barque, and schooner.

73d cross-int. Have you ever had anything to do with the discharging of Calcutta or East India cargoes?

Ans. I have not.

74th cross-int. Would or would not the number of lay days which a vessel had remaining under her charter affect the time of her loading?

Ans. I think it would.

75th cross-int. Do you know how many lay days there were remaining under the charter of the Anna Kimball, in this case, when she arrived at Calcutta?

Ans. I do not.

76th cross-int. How short a passage have you known to be made by any ship from Calcutta here?

Ans. Well, it has been made, I think, in about 90 days by clippers, but ordinary sailing vessels are from 4 to 5 months.

77th cross-int. Do you know that the Anna Kimball, on her return from Calcutta here under the charter in this case, was obliged to put into a port of distress for repairs?

Ans. I know that the ship did deviate.

78th cross-int. Did not Mr. Kimball tell you that she had to put into a port on her passage for repairs?

Ans. No, sir, he did not, to my recollection. I forget where she put in.

79th cross-int. Did he tell you that she had to put into port on her passage for any purpose?

Ans. I knew that she did put into port, but I don't recollect whether he told me, or how I knew it.

33 *Direct examination resumed.*

1st D. R. Do you remember who first proposed 6 months as the time on which the note should be made?

(Objected to.)

Ans. I think it was Kimball.

2d D. R. When Mr. Kimball agreed to the change in the charter, on condition of giving the notes, how and to whom did Messrs. Lyman give their consent to the conditions?

Ans. To me, in all probability.

3d D. R. Has your business as a broker led you to know the sailing and carrying qualities of the ships you deal with?

(Objected to.)

Ans. Yes, I generally acquaint myself with them.

4th D. R. Has it led you to know the usual length of voyages, and the usual times of loading and the like?

Ans. It has.

Cross-examination resumed

1st re-cross-interrogatory. Are you sure you stated to the Messrs. Lyman that the charter could only be altered upon the condition of their giving these notes?

Ans. No; on the contrary, Mr. Kimball would have accommodated them if they did not accommodate him.

JAMES MERRITT.

34 *The deposition of Wm. P. Lyman, of Boston.*

1st interrogatory. Were you of the firm of Geo. T. & Wm. P. Lyman, of Boston, in the year 1857?

Answer. Yes.

2d int. How long have you been engaged in the Calcutta trade?

Ans. Some ten or twelve years.

3d int. Please to state how largely.

Ans. All the way from fifty thousand to three hundred thousand dollars a year.

4th int. How many voyages in those years, to the best of your recollection?

Ans. I have been interested in fifty voyages, perhaps, during that time.

5th int. Has your business led you to know the sailing and carrying qualities of vessels you employ, and the time required for loading and discharging?

Ans. Yes, particularly so.

6th int. How long have you known the A. Kimball?

Ans. I have known of her 5 or 6 years.

7th int. Take a vessel like the Anna Kimball; how long would you allow for her at Calcutta, from arrival to final sailing, judging from probabilities only, in July and August, when she was under charter?

(Objected to.)

Ans. Vessels loading there in July and August are generally delayed from 60 to 75 days; sometimes they get under way quicker.

8th int. How long would you allow for a passage from Calcutta to Boston, leaving Calcutta about 1st September, of a vessel like the Anna Kimball?

(Objected to.)

Ans. It is a very uncertain passage indeed; sometimes is very long and sometimes very short; sometimes 150, and sometimes 120, and 110 days. I think the average passage would be about 135 or 140 days.

9th int. How long would you allow for such a vessel to discharge a Calcutta cargo in Boston, in January or February, from arrival to final discharge, taking chances of weather, allowing for custom-house rules, getting into berth, &c.

(Objected to.)

35 Ans. From 2 to 3 weeks.

10th int. Do you remember the circumstances connected with notes you gave to Mr. Edmund Kimball for $10,000, of August 31, 1857?

(Objected to.)

Ans. Yes.

11th int. Did you know at that time where the ship was? What did you know of her prospects?

(Objected to.]

Ans. I did; she was in Calcutta, I am very sure; her prospects were not

decided; she had liberty to deviate on her voyage to Boston; we could employ her out there if we chose. I don't think the agent had made up his mind what to do with her at that time; our expectations were from his letters and our instructions that she would not come home.

12th inst. Please to state the circumstances fully, connected with the giving of the notes.

(Objected to.)

Ans. They were given as an accommodation to Mr. Kimball to raise money with, and he agreed to take them up if they fell due before the ship got in. [I did not consider them as a payment on account of the charter, but merely as a favor to Mr. Kimball, on account of favors to us, on account of other matters. There was a compromise made about another ship that we had of his.]

(Part in brackets objected to.)

13th int. Please to state fully what the agreement or understanding was, if any, to which you refer, in case the times of falling due of the notes and the charter money did not coincide.

(Objected to.)

Ans. If the notes fell due before the ship got in, then Mr. Kimball was to take them up or renew them. If the ship got in before the notes became due, he was either to return them or deduct them from the charter money.

14th int. In the negotiations as to giving these notes, with whom did you confer?

(Objected to.)

Ans. We conferred with Mr. Merritt and Mr. Kimball. Mr. Merritt acted as agent in the transaction.

15th int. How many interviews did you have with Mr. Kimball on the subject of giving the notes?

(Objected to.)

Ans. Several.

16th int. Was there any agreement or understanding to the effect
36 that by taking these notes Mr. Kimball relinquished any lien he might have, if any, on the cargo, for the charter money?

(Objected to.)

Ans. Not that I am aware of.

17th int. Was there any agreement in writing on the subject of the notes, beyond the notes and a receipt of the same date Mr. Kimball gave you?

Ans. I think not.

18th int. You have said that if the charter money fell due before the notes, Mr. Kimball was to surrender them, or deduct their amount. If he surrendered them, was there any agreement or understanding that he lost, or in any way impaired his lien?

(Objected to, for form and substance.)

Ans. No. If he gave them up, there was an end of them.

19th int. If the notes were given up by him, either before the charter money fell due, or at that time, was the charter, or the rights under it, to be affected; and if so, how?

(Objected to, form and substance.)

Ans. No. If the notes were given up, the charter was in its original position, as I understand it.

20th int. If the notes were in any sense anything more or other than accommodation notes, which he could return to you whenever he pleased, be so good as to state how so?

(Objected to, form and substance.)

Ans. I don't think they were anything more than accommodation notes.

21st int. What were the probabilities at the time the notes were given, 31st Aug., 1857, as to the time the vessel would reach Boston?

(Objected to.)

Ans. She would probably reach Boston and discharge her cargo, and her charter become due about the middle of February or the first of March. Ten days' grace on the charter; I believe this includes that.

22d int. When was the great financial crisis of 1857-8? When did it begin?

(Objected to.)

Ans. October, 1857, was about the commencement of it—the severity of it.

23d int. Did your firm become insolvent at that time; and when was your insolvency known?

(Objected to.)

Ans. It did. It was known, I think, about the 12th of October.

24th int. Did Mr. Kimball do anything, and what, respecting returning the notes to you, and when?

(Objected to.)

37 Ans. He offered back the notes after our insolvency.

25th inst. How long after? When was it as to the arrival of the ship?

(Objected to.)

Ans. It was shortly after we failed; about a fortnight, I think. It was about three months and a half previous to the arrival of the ship.

26th int. When did the ship arrive in Boston, to the best of your recollection?

Ans. Early in February, to the best of my recollection.

27th int. When the ship arrived, and her cargo was discharged, was your firm still insolvent?

Ans. Yes.

28th int. Has your firm gone through insolvency under the laws of Massachusetts?

Ans. Yes.

29th int. Has the discharge been granted under those laws?

Ans. Yes.

30th int. Have you ever paid those notes, or any part of them?

Ans. No.

31st int. If there was anything Mr. Kimball could do towards returning the notes, under your agreement, which he did not do, before the ship arrived, please state it.

(Objected to, form and substance.)

Ans. There was nothing; he offered them back, and we refused to take them. Under the circumstances we could not very well take them back.

32d int. Please to state on what ground did you decline to take the notes back?

(Objected to.)

Ans. On the ground that we were insolvent, and the ground of uncertainty of what authority we had to act in any way.

33d int. Did you ever take the ground that Mr. Kimball had no right to return them under the agreement?

(Objected to, form and substance.)

Ans. No.

34th int. How did the right and title to the cargo stand at the time he offered back the notes?

[Objected to.]

Ans. The great bulk of the cargo, Duncan, Sherman & Company had a lien upon, through a credit.

35th int. Do you mean a credit given by them to you for purchase of the cargo?

Ans. Yes.

38 36th int. Where is your brother, Mr. Geo. T. Lyman?

Ans. He is on his way to India.

37th int. When did he sail from here, and when is he expected to return?

Ans. He sailed from New York the 17th November, 1860. It is uncertain when he returns.

38th int. In 1837, what was the usual time for letters from Calcutta to Boston?

(Objected to.)

Ans. About from 50 to 60 days.

(The claimants object to the witness as incompetent, on the ground of interest, and without waiving this or any of the foregoing objections, put the following cross-interrogatories, *de bene esse*:)

Cross-interrogatories by David Thaxter, esq., of counsel for claimants.

1st cross-interrogatory. At the time you gave these notes did you not take from Mr. Kimball a writing in regard to the same?

Answer. Yes.

2d cross-int. Is the paper now shown you a copy of it; and did you effect the insurance therein referred to?

Ans. It is the substance of it; I don't know whether it is an exact copy or not: I presume it is; I think I effected the insurance; I can't swear to it; I am very sure of it.

3d cross-int. At what office did you get the insurance?

Ans. I don't know.

4th cross-int. At what offices did you insure at that time?

Ans. I can't tell without referring to books, there was so much insurance.

5th cross-int. What books will show at what offices you insured?

Ans. Our regular accounts.

6th cross-int. What accounts will show where you insured these amounts?

Ans. Our regular books will show it.

7th cross-int. What particular account will show it?

Ans. The waste-book will show it; the daily entries.

8th cross-int. Do you know what is meant by the question, of what particular account, in a set of books, will show any specific transaction?

Ans. I don't understand the question.

39 9th cross-int. When you are asked what particular account in your books will show where insurance is effected, what do you understand the question to mean?

Ans. I don't comprehend it at all.

10th cross-int. Did you have separate accounts in your books?

Ans. Yes; every voyage was separate in the conclusion of the voyage.

11th cross-int. Did you have any insurance account in your books?

Ans. Yes.

12th cross-int. Was it kept as a separate account?

Ans. I think some particular cases of insurance were. We had separate accounts with some offices.

13th cross-int. What offices do you refer to?

Ans. We had one with the Hope office, I think was one.

14th cross-int. Did you have any account on your books with the owners of the Anna Kimball for this voyage?

Ans. I don't recollect. I suppose that note was recorded on our books at the time it was given.

15th cross-int. Did you charge the owner with the cost of effecting insurance on the amount of the notes?

Ans. I presume so.

16th cross-int. Where is the original of the paper referred to in the 2d cross-interrogatory?

Ans. I don't know.

17th cross-int. Is it in your possession or control? When and where did you last see it?

Ans. No. I don't remember when I last saw it.

18th cross-int. What became of the books and papers of your firm?

Ans. I don't know where they are. They went into the hands of assignees.

19th cross-int. Who applied to you for these notes; and was the application made to you or to your brother?

Ans. Mr. Merritt and Mr. Kimball applied to us both.

20th cross-int. Who came to you first about it?

Ans. Mr. Merritt, I think.

21st cross-int. Did he then apply to you, or to your brother?

Ans. Both, I think.

22d cross-int. Do you remember how it was?

Ans. To both of us. He came into our office when we were both of us there.

23d cross-int. What did he say?

Ans. Asked us to lend Kimball our notes.

24th cross-int. Did he not ask you to let Kimball have your notes for ten thousand dollars on six months, on account of the charter of the Anna Kimball?

Ans. Yes, that may have been the form of it; the receipt shows. [The charter party was a sort of collateral security, I suppose; it could not have been given on account of the charter-party, because the ship was not certain to come home; then there would have been no charter money due if she had not come; there might not have been any due.] (The part in brackets objected to as irresponsive and incompetent.)

25th cross-int. Will you swear that there was one word said between you and Mr. Merritt or Mr. Kimball about the charter-party being collateral security for the notes?

Ans. No.

26th cross-int. Can you swear that any other language was used between you and Mr. Merritt or Mr. Kimball than that used in the paper a copy of which is referred to in your answer to the 2d cross-interrogatory?

Ans. No.

27th cross-int. Did your last answer apply to all the interviews between you and Mr. Merritt or Mr. Kimball?

Ans. There was some other understanding about the notes other than what the copy may specify.

28th cross-int. What else will you swear you now recollect was said by either you or Mr. Kimball or Mr. Merritt other than what was in that paper?

Ans. Why, that if the ship should not arrive till after the notes became due, they should either be taken up by Mr. Kimball or renewed.

29th cross-int. Did you not say, in addition to what is written as your last answer, that you did not think of anything else; and is not that true; or do you think of something else that was said?

(Objected to.)

Ans. I don't recollect anything now; there were various conversations about these notes.

30th cross-int. Who said what you state in your 28th cross-interrogatory?

Ans. Either Mr. Merritt or Mr. Kimball.

31st cross-int. Can you now recollect which?

Ans. Mr. Kimball is very deaf; it was either Mr. Kimball himself or Mr. Merritt, acting as spokesman for Mr. Kimball.

Question repeated.

Ans. No.

41 32d cross-int. Can you swear that one word was said about the time of the arrival of the ship at any of the interviews between you and Mr. Merritt or Mr. Kimball in relation to these notes?

Ans. No. I think I ought to correct that, because there was some general conversation about it, that the notes were made to about meet the arrival of the ship, provided she returned.

33d cross-int. Will you swear that you now recollect that there was one word said about the notes being made to about meet the arrival of the ship if she returned?

Ans. Yes.

34th cross-int. Who said it?

Ans. Mr. Merritt and Mr. Kimball.

35th cross-int. What was said about it?

Ans. That if the ship came home, these notes would about meet her arrival.

36th cross-int. When was this said; at which interview; and was your brother present?

Ans. He was present at such conversation, but I don't know which one it was.

37th cross-int. Will you swear that the time of these notes was fixed with reference to the arrival of the ship after Mr. Merritt applied to you for them, and that he didn't ask, at the outset, for notes on six months? And have you not stated, at about the time this suit was brought, that nothing was said about the arrival of the ship?

Ans. They were made to cover the probable arrival of the ship, or the possible arrival.

38th cross-int. Have you not stated to Mr. Baker and others, about the time this suit was commenced, that you expected to get a longer credit by giving these notes, and that was one reason why you gave them?

Ans. I never said so, that I recollect.

39th cross-int. If you did say so, your then memory of the transaction was fresher and more correct than now, was it not?

Ans. No; my memory of the transaction is very clear now—as clear as it ever has been.

40th cross-int. How many lay days did the ship use in New York?

Ans. I can't tell without reference to documents and papers.

41st cross-int. What papers would show it?

Ans. The charter-party, I suppose.

42d cross-int. Where did the vessel go to from New York?

Ans. Melbourne, Australia.

43d cross-int. How many lay days did she use at Melbourne?

Ans. I don't know.

42 44th cross-int. Have you any papers which will show this?

Ans. Not in my possession.

45th cross-int. In whose possession are they?

Ans. I don't know.

46th cross-int. Who was your agent or acted as your agent in Melbourne when the ship was there?

Ans. I forget the name of the house.

47th cross-int. Have you any papers which will call it to your mind?

Ans. I think not.

48th cross-int. What has become of the letters or correspondence with them?

Ans. I don't know anything about them.

49th cross-int. Did you have advices from them as to the arrival and disposition of the ship at and from Melbourne?

Ans. Yes.

50th cross-int. You know, then, how many lay days the ship had used under the charter-party before going to Calcutta, at the time when you gave these notes, did you not?

Ans. Yes.

51st cross-int. How many lay days had the ship a right to, under the charter, when she was at Calcutta?

Ans. I don't recollect.

52d cross-int. Who was your agent at Calcutta?

Ans. James H. Adams.

53d cross-int. He wrote you on the arrival of the ship at Calcutta, did he not?

Ans. About that time.

54th cross-int. Did you not receive that letter before you gave these notes?

Ans. I believe so.

55th cross-int. Where is that letter?

Ans. I don't know.

56th cross-int. Did you give it to your assignees?

Ans. Yes.

57th cross-int. Did you give to your assignees all the correspondence between you and Mr. Adams?

Ans. I think so.

58th cross-int. Is not the time taken in loading affected by the number of lay days which a ship has remaining to her?

Ans. Not necessarily.

60th cross-int. Is it not usually and ordinarily?

Ans. No.

43 61st cross-int. What was the interest of Duncan, Sherman & Co. in the goods in this case.

Ans. They granted a letter of credit for their purchase.

62d cross-int. Do you mean that you purchased the goods on letters of credit furnished by them, and that the goods were shipped to them under bills of lading to them as security for amount thus loaned?

(Objected to.)

Ans. Yes.

63d cross-int. Were the amounts thus obtained by your firm upon these letters of credit of Duncan, Sherman & Co. ever repaid to them?

(Objected to.)

Ans. They sold the goods and paid themselves in that way, as far as they would go.

64th cross-int. They have never been repaid, except so far as the proceeds of the sale of the goods would go towards it, have they?

(Objected to.)

Ans. Not unless they have had a dividend on our insolvent estate. think not. I think they have not proved their claim.

65th cross-int. Was there other cargo on board the ship beside that consigned to Duncan, Sherman & Co.?

(Objected to.)

Ans. None belonging to us.

66th cross-int. Was there other cargo belonging to other parties?

Ans. Yes.

67th cross-int. About what was the freight of such other goods?
Ans. About seven thousand dollars.
68th cross-int. Who collected that freight?
Ans. I don't know.
69th cross-int. Did your firm?
Ans. No.
70th cross-int. Have you not heard Mr. Kimball say that he did?
Ans. I think not.
71st cross-int. Was the ship obliged to put into a port of distress on her return voyage from Calcutta for repairs?
Ans. Yes.
72d cross-int. What port did she put into?
Ans. Isle of France.
73d cross-int. How long was she detained there?
Ans. About a month, I think.
74th cross-int. Whether, at the time you gave these notes, you had determined what to do with the ship will be shown by your correspondence between you and Mr. Adams, will it not?
Ans. I suppose so.
75th cross-int. At the time you gave these notes, was your firm in good credit?
Ans. I don't know.
76th cross-int. What was its reputation in that respect at that time?
Ans. I don't know that a man is a good judge of his own credit.
77th cross-int. Was there anything said between you and Mr. Kimball or Mr. Merritt about the possibility of your being unable to meet those notes when they matured?
Ans. No.
78th cross-int. Was one word said at any of the interviews between you and Mr. Merritt or Mr. Kimball, in reference to these notes, about Mr. Kimball's lien on the cargo or freight for the charter money?
Ans. No.
79th cross-int. Was one word said at any of these interviews as to whether any of Mr. Kimball's rights under the charter would or would not be in any way affected by taking these notes?
Ans. No.
80th cross-int. Do you now recollect that, at any of these interviews, anything was said between you and Mr. Kimball or Mr. Merritt about what you were going to do with the ship?
Ans. I think not; nothing definite.
81st cross-int. Was your brother present at all these interviews about the notes?
Ans. Not at all.
82d cross-int. Who carried on the principal part of the negotiation, you or your brother?
Ans. I don't know.
83d cross-int. Did not your brother finally decide the matter?
Ans. No. He acted as one in our business.

Direct examination resumed.

1st D. R. Can you recollect who it was that said what you have testified to respecting what might be done about the notes in the event of the charter money falling due before the notes should fall due?
Ans. Mr. Kimball.
2d D. R. Please refer to the 24th cross-interrogatory, and your an-

swer. Do you mean that he proposed all these terms at once—the time, amount, account, &c.—without any intervening conversation on the subject of those terms?

Ans. I think there were various conversations about the matter.

3d D. R. Was there anything said between you and Mr. Kimball, or his agent, as to who should pay for the insurance on the $10,000, and why? And please to state all that took place on that subject.

(Objected to.)

Ans. Mr. Kimball agreed to pay for that insurance, on the ground that it was an accommodation to him.

4th D. R. Do you know that you did, in fact, effect an insurance on the amount of the notes?

(*De bene*—in case the written receipt is proved.)

Ans. We effected it, or I suppose we effected it.

(At the request of Mr. Dana, the question is repeated; and the witness answers no.)

5th D. R. Do you know whether or no any premium of insurance was, in fact, charged to the owners of the ship?

(Objected to.)

Ans. No, I don't.

6th D. R. Please refer to the 19th cross-interrogatory, and your answer. In what did the application originate? Please give the whole history.

Ans. I don't know what you mean by it, exactly.

7th D. R. What preceded his application to you for the notes, if anything?

Ans. He asked us for the notes. We had some transactions with another vessel belonging to Mr. Kimball, and the request for the notes arose out of that.

8th D. R. Please state what that transaction was, and how the request for the notes arose from it.

(Objected to.)

Ans. Some change in the charter of another ship, which was an accommodation to us, and that was the inducement to us to give these notes.

9th D. R. What ship was it whose charter you wished altered?

(Objected to.)

Ans. Belle of the Sea.

10th D. R. Before you applied for the alteration in the charter of the Belle of the Sea, had anything been said to you, or intimated, as to giving these notes for the accommodation of Mr. Kimball?

(Objected to.)

Ans. I think not.

46 11th D. R. When you applied for that change in the charter of the Belle of the Sea, to whom or through whom was the application made?

Ans. Mr. Merritt.

12th D. R. What reply did you receive?

[Objected to.]

Ans. An indefinite reply at first.

13th D. R. Please to state all that took place after you applied, until the giving of the notes was agreed upon.

(Objected to.)

Ans. Mr. Merritt acted as a broker to assist us in making a change in the charter; he accomplished the change, and the notes were given to Mr. Kimball partly upon the feeling that he had obliged us.

14th D. R. Please to state what was said, proposed, or agreed to, on each side. What was first proposed, and by whom? What reply? What next? and so on. Begin at the first proposal on the subject of the Belle of the Sea.

Ans. I can only answer indefinitely, without seeing the charter-party. A change in the charter-party was first proposed by us, and objected to, and finally agreed to by Mr. Kimball; that finishes the Belle of the Sea, I think.

15th D. R. My last question does not ask you to end with the Belle of the Sea, but to begin with it.

(Objected to.)

Ans. Then Mr. Kimball requested us to loan him our notes, and after some negotiations we gave them to him, partly through feeling obliged to him.

16th D. R. Were one of the interviews you had with Mr. Kimball at the counting-room of Mr. P. M. Parkman?

(Objected to.)

Ans. I had some conversation with Mr. Kimball there.

17th D. R. Was it on the subject of these notes?

(Objected to.)

Ans. Yes.

18th D. R. Can you distinguish what was said there from all the matters you have testified to?

(Objected to.)

Ans. It was a short conversation; he said that he would take care of the notes if they became due before the ship arrived.

19th D. R. How long was this before the notes were given, if it was so, or how otherwise?

(Objected to.)

Ans. I can't recollect.

47 20th D. R. Please explain your last answer. What is it that you do not recollect?

Ans. I don't recollect how long before the notes were given.

Cross-examination resumed.

1st re-cross-interrogatory. If insurance on these notes was effected by you, it was charged to Mr. Kimball, was it not?

Answer. Yes.

2d re-cross-int. *(de bene.)* Have you not said, and that within a few days, that nothing was said at the interviews about the notes, as to what was to be done with them if the ship arrived before they matured?

Ans. No.

3d re-cross-int. *(de bene esse.)* Have you not so stated to Mr. Baker within forty-eight hours?

Ans. No.

4th re-cross-int. *(de bene esse.)* Who first called your attention to the conversation in P. M. Parkman's office?

Ans. Mr. Kimball asked me if I recollected it.

5th re-cross-int. *(de bene esse.)* When did he ask you?

Ans. Yesterday, I think.

6th re-cross-int. Had your attention been called to that conversation since it occurred, before yesterday?

Ans. I think not.

7th re-cross-int. And you are willing to swear to it as a matter of your present recollection, and yet say that you cannot recollect whether you effected insurance on these notes, are you?

Ans. Yes.

8th re-cross-int. *(de bene.)* Can you particularize the time and place of any other conversation?

Ans. I cannot the time; I can the place: our office.

9th re-cross-int. *(de bene.)* How happened you to be in Mr. Parkman's office?

Ans. I am frequently there.

10th Re-cross-int. *(de bene.)* What else occurred there at this time?

Ans. Nothing that I know of.

11th re-cross-int. *(de bene.)* Can you swear, of your present recollection, one single thing that was said or done there at this time except what you have stated?

Ans. No.

48 12th re-cross-int. *(de bene.)* Can you state who was in the counting-room?

Ans. Mr. Kimball and Parkman.

13th re-cross-int. *(de bene.)* Anybody else?

Ans. No.

14th re-cross-int. *(de bene.)* Are you sure?

Ans. Yes.

15th re-cross-int. Where were you standing?

Ans. I don't know.

16th re-cross-int. *(de bene.)* Will you swear that you recollect that conversation, or did you testify to it because Mr. Kimball tells you it did occur?

Ans. I recollected it.

17th re-cross-int. *(de bene.)* Did you communicate it to your brother?

Ans. I don't recollect.

18th re-cross-int. *(de bene.)* What else did you and Mr. Kimball talk about at this time?

Ans. Nothing.

19th re-cross-int. *(de bene.)* Are you sure?

Ans. Yes.

20th re-cross-int. *(de bene.)* Who left Mr. Parkman's office first?

Ans. Mr. Kimball.

21st re-cross-int. *(de bene.)* Who first introduced the subject?

Ans. Mr. Kimball, I think.

22d re-cross-int. What did you say?

Ans. I don't know that I said anything to him.

23d re-cross-int. *(de bene.)* Did Mr. Kimball remind you of anything yesterday, about this interview, except what he told you he said?

(Objected to.)

Ans. No.

WM. P. LYMAN.

49 UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

I, George D. Guild, a commissioner in and for the district of Massachusetts, appointed by the circuit court of the United States for the first circuit, under the act of Congress authorizing the appointment of commissioners "for the more convenient taking of affidavits and bail, to be used in civil causes depending in the courts of the United States," and the acts additional thereto, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the said Merritt and Lyman are material and necessary witnesses in the cause in the caption of the said deposition named.

I further certify that the adverse party was notified to be present at the taking of the same, and to put interrogatories if he saw fit, and that he was present and consented to the taking thereof.

I further certify, that on the 19th and 20th days of December, in the year eighteen hundred and sixty, I was attended by said Merritt and Lyman, the said witnesses, who are of sound mind and lawful age, and the said witness

having been by me first carefully examined and cautioned and sworn to testify the whole truth in the cause aforesaid, did answer to the interrogatories and cross-interrogatories put to them, and the testimony given by them was by me reduced to writing in the presence of the witnesses, and that they subscribed the same as and for their deposition, in my presence, and that I have retained the said depositions in my possession for the purpose of forwarding them, under my own hand, to the court for which they are taken, with this certificate of the reason of their being taken.

I further certify that I am not of counsel or attorney to either of the parties in the cause in and for which the said depositions are taken, nor in any way interested in the event of said cause.

In testimony whereof, I have hereunto set my hand and seal this twentieth day of December, in the year of our Lord eighteen hundred and sixty.

G. D. GUILD.

Commissioner of the Circuit Court of the U. S., Mass. District.

50 Circuit court of the United States for the district of Massachusetts.

EDMUND KIMBALL *et als.* vs. CARGO OF SHIP ANNA KIMBALL. } Duncan, Sherman & Co., claimants.

UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

Be it remembered, that on the 28th day of March, and the 28th day of September, and the 5th day of October, in the year of our Lord eighteen hundred and sixty-one, at Boston, in said district of Massachusetts, before me, George D. Guild, a commissioner in and for the district of Massachusetts, to take affidavits and bail in civil causes depending in the courts of the United States, appointed by the circuit court of the United States for the first circuit, under the acts of Congress in such case made and provided, personally appeared Charles Marsh, John Hurley, William S. Rhoades, and John R. Kimball, witnesses for the libellants in a certain libel depending in the circuit court of the United States in and for the circuit and district of Massachusetts, wherein the parties above named are libellant and respondent; and the said witnesses being by me first carefully examined and cautioned and sworn to testify the *whole* truth relative to the issue, did depose and say, in answer to interrogatories proposed to them, as follows, viz:

The deposition of John R. Kimball, Oct. 5, 1861.

1st interrogatory. What is your name, age, occupation, and residence?

Answer. Name, John R. Kimball; age, 30 years; residence, Newton, Mass.; occupation, counsellor-at-law and merchant; and I am a son of the libellant, Kimball.

2d int. Please to state what you know, of your own knowledge, respecting the circumstances attending the making and use of the notes given to your father by the Messrs. Lyman.

(Objected to.)

51 Ans. I had no knowledge personally of the giving of the notes, until the failure of the Messrs. Lyman, not having previously any immediate connexion with my father's business. My father informed me of the fact of the notes being made, and requested me to accompany Mr. Merritt to an interview with the Messrs. Lyman, at their office on State street, Boston, at which interview we offered a return of the notes in dispute to the Messrs. Lyman in exchange for their receipt for them. Mr. Wm. P. Lyman only was present as we entered. After a brief conversation he consented to the arrangement, and was about to make the exchange, when his brother,

George T. Lyman, entered and checked him. They both admitted that the arrangement was but temporary. Mr. William P. Lyman stated that he wished to act straightforwardly and settle the matter immediately, but Mr. George T. Lyman wished to consider it somewhat further, and requested us to call again in a few days. This first interview was held as soon as the failure of the Messrs. Lyman was intimated on the street, and, as nearly as I can recollect, about six weeks after the date of these notes.

I was quite anxious to have the matter settled, and within a very few days made a second call, at which interview Mr. George T. Lyman stated that he had not arrived at a decision, but was in no doubt in regard to his duty in the affair, and was only deterred from conforming to our proposition by business considerations arising out of the exigency in which he was then situated. At my next interview with Mr. George T. Lyman he stated that by advice of his attorney he should decline acting as we proposed. He said he thought he ought to do as he had agreed, or as it was understood it should be—that is, to secure Mr. Kimball from any loss—but he feared to do so, on account of penalties attached to preference of creditors, or what might seem to be such. He said that a few of his creditors were quite hostile to him, and might employ any advantage they might gain to involve him in difficulties. That was the result of our interviews.

(Answer objected to.)

3d int. What arrangement do you mean Mr. Lyman said was only temporary?

(Objected to.)

Ans. The arrangement for Mr. Kimball's accommodation in the advance of these notes.

4th int. Was Mr. Merritt present at any but your first interview with Mr. G. T. Lyman?

Ans. I am not certain. I think not. Mr. Merritt accompanied me for the purpose of introduction at the first interview.

5th int. Please to state all the reasons Mr. George T. Lyman gave for not receiving back the notes, if you have not done so.

(Objected to.)

52 Ans. His reasons seemed to be a fear of action by other creditors. He stated that he did not wish to take any action without the advice of his lawyer, although he personally was disposed to accede to our proposition.

(Objected to.)

6th int. What was said on either side, if anything, as to the right of Mr. Kimball to give back the notes, if he desired to do so?

(Objected to.)

Ans. I don't know that anything special was said. It seemed to be admitted that Mr. Kimball was to be secured, and his wishes consulted in the matter.

(Objected to.)

7th int. Did either of them claim that the notes were payment, or in the nature of payment, making Mr. Kimball creditor to their amounts?

(Objected to, for form and substance.)

Ans. They did not.

8th int. Please give the dates of arrival and final discharge of the Anna Kimball?

(Objected to.)

Ans. After this I paid particular attention to the matters connected with this ship, being aware that certain legal steps were necessary for the security of the owners. I attended myself to all the details connected with the management of the ship. The ship arrived in Boston on the 22d of January,

1858, lay in the stream until the 28th of January, when she hauled to the wharf, was finally discharged on the 23d of February, 1858.

9th int. State any circumstances in your knowledge as to the speeding or delaying of her discharge.

(Objected to.)

Ans. Mr. Kimball used every effort to facilitate her discharge, directing me repeatedly to call upon parties and use other means to effect her discharge. The weather at that time was unusually severe, or very severe.

(Objected to.)

J. R. KIMBALL.

53 *Deposition of Charles Marsh, of Newburyport, Mass., March* 28, 1861.

1st interrogatory. What is your name, age, and occupation and residence, and how long have you followed the seas, and how long have you been in the capacity of shipmaster?

Answer. Name is Charles Marsh; age, fifty years; residence, Newburyport, and occupation shipmaster. I have followed the seas for 30 years. I have been for 25 years master of different kinds of vessels.

2d int. Have you commanded the ship Anna Kimball?

Ans. Yes, sir.

3d int. When, and on what voyages?

Ans. I first bought into the Anna Kimball the 12th day of March, three years ago. My first voyage was to London from Boston. I sailed the 12th day of April, 1858, I think; the next from London to Shiels, and thence to New York, thence to San Francisco, thence to Mazatlan, Mexico, thence to London, thence to Shiels, thence to New York, thence to Rotterdam, thence to Sunderland, thence to New York, where we arrived the 17th of last January, and where the ship now is.

(The defendants object to the witness by reason of interest.)

4th int. Please to describe the sailing qualities of the Anna Kimball?

(Objected to.)

Ans. The ship is rather a dull sailer, especially in light winds; in strong breezes and fair winds we get along with a middling class of vessels.

5th int. Is she, or not, up to the average of vessels of her size in light winds?

(Objected to.)

Ans. I should think not in light winds. I should think she was rather below the average in light winds.

6th int. In moderate winds, neither light nor strong, how is she close-hauled and full laden?

(Objected to.)

Ans. With a pretty good breeze she is about middling. She is rather a dull sailer. When there is a strong breeze we get along with a middling class of vessels.

7th int. Have you any reason to suppose that her sailing qualities were different when you had her from what they were for a year or two before you had her?

(Objected to.)

54 Ans. I should not suppose there was any great difference. I should not suppose there could be. She was newly coppered when I took her, and in good order every way. I should not think there could be any difference.

8th int. What classes of vessels have you sailed in before her?

Ans. I have been in barks, brigs, and schooners.

Cross-examination by David Thaxter, esq.

1st cross-interrogatory, (put *de bene esse*, without waiving objection to competency of witness.) You have been interested in the Anna Kimball ever since you say you bought her, have you not; and have been ever since, and are now her master, are you not?

Ans. Yes, sir.

CHARLES MARSH.

The deposition of Wm. S. Rhoades, September 28, 1861.

1st interrogatory. Where do you reside? What is your age? Have you followed the seas, and how long?

Answer. At Marblehead, Mass.; age 57; I have followed the seas ever since I was 17 years old.

2d int. Have you been a shipmaster, and how long?

Ans. I have been master of different kinds of vessels for about 32 years.

3d int. Have you been Calcutta voyages, and how long?

Ans. Never Calcutta voyages. I have been East India voyages. I have been six different voyages to the East Indies.

4th int. How long have you known the ship Anna Kimball?

Ans. Ever since she was built. I worked upon her when she was built. I helped paint her.

5th int. How long ago is that?

55 Ans. I could not tell rightly the year. I should think about 11 years ago. I would not swear to it.

6th int. How long have you been engaged in discharging vessels?

Ans. Ever since I have been master.

7th int. Have you noticed and watched the Anna Kimball's voyages, and why?

Ans. I have, because, when I have been in her, I have always wanted to know at what time they began to discharge, and when they finished.

8th int. What are her sailing qualities?

Ans. Very dull.

9th int. If she should sail from Calcutta in September, how long time would it be safe to make calculations upon, for her arrival in Boston, allowing for the time of year being in the winter?

(Objected to.)

Ans. I should give her five months when I should not give the Belle of the Sea over four months?

10th int. Would it or not be safe at that season, in your judgment, to make calculations on less than five months?

(Objected to.)

Ans. No, sir; I should not think it would.

11th int. What is the course of things for a vessel coming from Calcutta, after her arrival, with reference to waiting, delays, &c., for discharging?

(Objected to.)

Ans. We have to lay five or six days before we can get through the custom-house to discharge.

12th int. Does or not a Calcutta ship require dry weather for discharging?

(Objected to.)

Ans. Yes, sir; it does.

13th int. For a vessel of the size of the A. Kimball, with a Calcutta cargo, arriving here in January, February, or March, how long time would it be safe to allow from the day of her arrival until her final discharge in the usual and average course of things?

(Objected to.)

Ans. I should think four weeks would be about reasonable and right, considering the weather in winter time.

14th int. What had you to do with discharging the Anna Kimball in the year 1858?

Ans. I helped sew up some of the seed and the bagging.

15th int. What were you doing on board?

Ans. I was shipkeeper.

56 16th int. Can you state when she arrived, and the dates of her coming to the wharf, beginning to discharge, and final discharge?

Ans. I went aboard of her January 25; she came in a day or two before I went aboard. She came into dock the 29th. We begun to discharge February 1st, and she was finally discharged the 23d, I think it was either the 22d or 23d.

17th int. What did she take out last?

Ans. Saltpetre and some wood; I forget the name of the wood.

18th int. How much salpetre did she take out on the 23d?

Ans. I think somewhere about 800 bags; I won't swear.

19th int. When did you take in ballast?

Ans. We took in some ballast before the saltpetre was taken out, to keep her on her legs.

20th int. What did you do after the 23d of February?

Ans. Hauled across the dock to the other wharf. Then we went from there down into the dry dock to have her coppered.

21st int. Was anything, and what, left on board after the 23d, and when taken out?

Ans. Yes, sir; some dates and a few other small packages; they were taken out on the other side. Somebody from Mr. Merritt's came and took the dates away.

Cross-examination by David Thaxter, esq.

1st cross-interrogatory. Had you any interest in the Anna Kimball at the time when you have stated you were shipkeeper on board of her?

Answer. No, sir.

2d cross-int. How long would it take to get out the dates and small packages which you say you took out on the other side?

Ans. Not half an hour, when we could find them. They came after them several times before we could find them.

3d cross-int. How long did you find them before they were delivered?

Ans. They were taken away as soon as we found them.

4th cross-int. Were they a part of the cargo on freight, or were they placed there by the master?

Ans. I could not say.

5th cross-int. What did they amount to in bulk, or weight?

Ans. Not over 300 or 400 pounds. They were in two half barrels. The parties coming for them said they were in bags, and that is the reason we did not find them earlier.

57 6th cross-int. In the East Indian voyages you have made, in what capacity did you sail?

Ans. I have been before the mast and as mate.

7th cross-int. How many of those Indian voyages as mate, and as 1st or 2d mate?

Ans. Second mate one voyage, and chief mate two voyages.

8th cross-int. In what vessel as mate, and when?

Ans. In the Java, as 2d mate, in 1827, in the Thomas Dixon, as 1st mate, somewhere about 1837.

9th cross-int. How long since you have been to sea?

Ans. Three years ago.

10th cross-int. In what capacity and in what vessel?

Ans. As master, in the brig Mary Elizabeth.

11th cross-int. Did you ever go master of a ship, and if so, how large, and in what years?

Ans. No, sir.

12th cross-int. What class of vessels, and how large, have you been in the habit of sailing as master?

Ans. The largest was the brig Martha and Mary, 320 tons, or thereabouts.

WILLIAM S. ROADS.

The deposition of John Hurley, September 28, 1861.

1st interrogatory. Where do you live? What is your age?

Answer. I live in Boston. My age is 45.

2d int. Are you a stevedore, and how long have you been so?

Ans. I am, and have been twenty years.

3d int. How long have you known the A. Kimball?

Ans. I should think for seven or eight years.

4th int. How often have you discharged her?

Ans. Every time she arrived in Boston.

5th int. Do you keep accounts of the dates of the arrival, commencing of discharge, and final discharge of vessels you are employed in?

Ans. Not of arrival, but of commencement and final discharge.

58 6th int. In 1858, what day did you go board the A. Kimball, and what day was she finally discharged?

Ans. I went aboard her January 28, 1858. We commenced discharging February 5, 1858, finished discharging Tuesday, the 22d, as I call it, but, from what I have afterwards learned, I am satisfied it was the 23d.

7th int. How do you know these dates?

Ans. I keep an account of my men's time on board the ship.

8th int. Have you now before you the account book of your work, and the work of your men?

Ans. Yes, sir.

9th int. Does saltpetre require dry weather for discharging?

Ans. Yes, sir.

10th int. Have you discharged many Calcutta cargoes?

Ans. A good many.

11th int. When did you take in ballast, before or after final discharge of cargo?

Ans. It was put in by another man before I finished discharging.

12th int. What work was done and what cargo discharged on the last day, Tuesday, 22d or 23d?

Ans. We put out some saltpetre and some dyewood.

13th int. Did as many men work that day as any other?

Ans. Yes, sir.

14th. For a vessel of the size of the A. Kimball, with a Calcutta cargo, arriving here in the winter, how many days would it be safe to allow from the day she drops anchor until her final discharge?

(Objected to.)

Ans. It depends a good deal on dry weather. I should say about a month.

Cross-examination by David Thaxter, esv.

1st cross-interrogatory. What day of the month does your book state you finished discharging her?

Ans. Tuesday, February 22, 1858.

2d cross-int. What days does your book state you worked in discharging her?

Ans. Friday, February 5, I commenced; Saturday, Monday, Tuesday, Thursday, Saturday. Then we were a week idle, waiting for ballast; the dock was frozen so they could not get it in, and there was one day so cold my men could not work. Monday we went to work again, and Tuesday we finished the vessel.

59 3d cross-int. When was 22d written in your book?

Ans. I presume at the time I wrote it.

4th cross-int. What is there in your book to show that you did not work for a week?

Ans. I kept no account of it in my book. I recollect it.

5th cross-int. What is there in your book to show what days of the week you worked?

Ans. The days are indicated by the letters F for Friday, S for Saturday, M for Monday, T for Tuesday, T for Thursday, S for Saturday, M for Monday, T for Tuesday.

6th cross-int. What is there in your book to indicate what days of the month these several days were?

Ans. February 5, 1858, is written down as the first day I commenced discharging her. The 22d is down as the day I got through. There is nothing else in the book to indicate the day of the month.

7th cross-int. Your book only shows that you actually did work in discharging cargo only on eight different days, does it not?

Ans. Yes, sir.

8th cross-int. When was your attention first called to the time you were occupied in discharging, and by whom?

Ans. I believe it was Mr. Kimball. I can't say which Mr. Kimball, whether father or son; I should think about a year ago.

9th cross-int. Between the time of discharging the Anna Kimball, and the time when Mr. Kimball spoke to you about it, you had discharged many other vessels, had you not?

Ans. A good many.

10th cross-int. When thus applied to, you would not have been able to give him days and dates from mere recollection without the aid of your books, would you?

Ans. No, sir; I could not.

11th cross-int. In testifying to days and dates, then, you rely upon your book, do you not?

Ans. Yes, sir; I rely on my book.

JOHN HURLEY.

60 UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

I, George D. Guild, a commissioner in and for the district of Massachusetts, appointed by the circuit court of the United States for the first circuit, under the act of Congress authorizing the appointment of commissioners "for the more convenient taking of affidavits and bail, to be used in civil causes depending in the courts of the United States," and the acts additional thereto, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the said Marsh, Hurley, Rhoades, and Kimball are material and necessary witnesses in the cause in the caption of the said deposition named.

I further certify that the adverse party was present at the taking of the same, and consented to the taking thereof, and stated he was duly notified.

I further certify that on the 28th day of March, and the 28th day of September, and the 5th day of October, in the year eighteen hundred and sixty-

one, I was attended by said Marsh, Hurley, Rhoades, and Kimball, the said witnesses who were of sound mind and lawful age, and the said witness having been by me first carefully examined and cautioned, and sworn to testify the whole truth in the cause aforesaid, did answer to the interrogatories and cross-interrogatories put to them, and the testimony given by them was by me reduced to writing in the presence of the witness, and that they subscribed the same as and for their deposition, in my presence, and that I have retained the said depositions in my possession, for the purpose of forwarding them, under my own hand, to the court for which they are taken, with this certificate of the reason of their being taken.

I further certify that I am not of counsel or attorney to either of the parties in the cause in and for which the said depositions are taken, nor in any way interested in the event of said cause.

In testimony whereof, I have hereunto set my hand and seal this fifth day of October, in the year of our Lord eighteen hundred and sixty-one.

G. D. GUILD,
Commissioner of the Circuit Court of the U. S., Mass. District.

61 Circuit court of the United States in and for the district of Massachusetts.

EDMUND KIMBALL, libellant,
vs.
A PART OF THE CARGO OF THE SHIP ANNA KIMBALL. } Alexander Duncan and others, claimants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

J. C. Bancroft Davis, of the city of New York, being sworn, doth depose and say that he is the counsel of Messrs. Duncan, Sherman & Co., who are the claimants in this case; that he has been informed by his clients of the facts in this case, and of what George T. Lyman will testify upon the issues in this case, and that the testimony of the said George T. Lyman is material and necessary for the said Duncan, Sherman & Co. in the prosecution of this cause; that the said George T. Lyman lives at New York, more than one hundred miles from Boston, where the court at which the said cause will be tried is appointed by law is to be held, and is bound on a voyage to sea, to wit, to Liverpool, in the kingdom of Great Britain, by the steamer sailing from the port of New York to-morrow, as the deponent is informed and believes. And this deponent further says that he is informed and believes that Edmund Kimball, the libellant, resides at Boston, in the State of Massachusetts, about two hundred miles distant from New York, the place where the examination of the said witness is expected to be taken, and that, as he is also informed and believes, the attorneys of said Kimball reside at Boston aforesaid, and neither the libellant nor his attorney is now within one hundred miles of the city of New York.

J. C. B. DAVIS.

Subscribed and sworn this 16th day of November, 1860, before me.
GEO. W. MORELL,
U. S. Commissioner, Southern District of New York.

62 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered, that on this sixteenth day of November, in the year of our Lord one thousand eight hundred and sixty, I, George W. Morell, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the State of New York and in the

second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at his residence, No. 76 West Eleventh street, in the city of New York, in the district and State aforesaid, George T. Lyman, to testify and the truth to say, on the part and behalf of the claimants in a certain suit or matter of controversy, now depending and undetermined, in the circuit court of the United States for the district of Massachusetts, wherein Edmund Kimball is libellant, against a part of the cargo of the ship Anna Kimball, Alexander Duncan *et als.*, claimants. And the said George T. Lyman being about the age of thirty-nine years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the suit or matter aforesaid, was by me carefully examined, and thereupon deposed, testified, and said as follows, viz: My name is George T. Lyman; I am thirty-nine years of age; I reside in the city and State of New York; I am a merchant; I intend to leave this country to-morrow, by steamer, for England, to be absent for an indefinite period—for several years.

Qu. Do you remember the matter of the charter by George T. & W. P. Lyman, from Edmund Kimball, of the ship Anna Kimball, in 1856, for a voyage from New York to Melbourne, Calcutta, and Boston?

A. Yes, I do.

63 Qu. What was the latest advice from that ship, and where was she at its date before the thirty-first of August, 1857?

A. She was in Calcutta; the latest advice was early in July.

Qu. At the date of her arrival at Calcutta, what number of lay days allowed by the charter were unexpired?

A. I am quite sure less than twenty.

Qu. What were your expectations, and what your instructions, or those of your firm, if any, as to the time she would occupy in loading at that port?

A. My instructions, if any, were that she should load within her lay days, if possible, and my expectations were that she would do so.

Qu. Was this ship delayed on her voyage home; and if so, where, and how long?

A. She was delayed. She put into Mauritius in distress, and remained there a considerable time.

Qu. Including this delay, what time did she occupy in making the port of Boston from Calcutta?

Ans. She arrived at Boston, I think, within six months; my impression is she arrived in December.

Qu. Upon the receipt of the advice of the ship in Calcutta, what time, exclusive of her detention there, did you regard as reasonable to allow for her passage to Boston?

Ans. Four months.

Qu. Do you remember an application by Mr. Edmund Kimball for an advance about 31st of August, 1857? And if so, state who made the application, to whom it was made, on what account, its amount and form, and the terms of the advance.

Ans. I do; it was made by Jerome Merritt, a ship broker; it was made to me finally; it might have been made in the first instance to my brother;

it was on account of the charter of the ship Anna Kimball, for ten thousand dollars, in two notes of five thousand dollars each at six months. There were no conditions at all; it was a further condition that Mr. Kimball should take out a policy on the freight to an amount equal to the advance, loss, if any, payable to any firm.

Qu. Was such policy taken out?

Ans. I could not state positively, but I have no doubt it was.

Qu. Which member of your firm finally decided to make this advance?

Ans. I did.

Qu. Why were these notes made payable at a period so far beyond the time of the expected arrival of the ship in Boston?

Ans. Because there was an additional credit obtained upon the charter money.

Qu. Do you refer to the charter money that would otherwise have been due when the cargo should be discharged in Boston?

64 Ans. I do.

Qu. Was anything said as between yourself and Mr. Merritt, or Mr. Kimball, during the negotiation of the advance of these notes, to the effect that they would or were designed to mature about the time of the arrival of the ship in Boston. And also state what was contemplated in that regard.

Ans. There was not; it must have been contemplated that they would mature some time after.

Qu. Give your reasons for saying that it must have been contemplated the ship would arrive before the maturity of the notes; and state whether these reasons influenced your firm in advancing the notes.

Ans. The reasons were that the ship was due in December, and the notes were due late in February, and these were the motives for our making the advance; there might have been other motives.

Qu. If you now recollect any other fact or matter in connexion with the subject of inquiry, and necessary to present a fair and truthful statement of the same, declare it fully.

Ans. I know and recollect nothing more.

GEO. T. LYMAN.

Sworn and subscribed this 16th day of November, 1860, before me.

GEO. W. MORELL,
U. S. Commissioner, Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

I, George W. Morell, a commissioner duly appointed by the circuit court of the United States for the southern district of New York in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for

65 taking the foregoing deposition is, and the fact is, the said witness is material and necessary in the cause in the caption of the said deposition named, and that he lives at a greater distance from the place of trial than one hundred miles, to wit, in the city and State of New York; and also is about to leave the United States.

I further certify that, on the sixteenth day of November, in the year of our Lord one thousand eight hundred and sixty, the said claimants, by counsel, and the said witness attended before me, at the place aforesaid, and the said witness being of sound mind and lawful age, and having been by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, the said deposition was by me reduced to writing in the presence of the said witness and from his statements, and having been by me carefully read to the said witness, was subscribed by the said witness in my presence; that I have retained the said deposition in my possession for the purpose of sealing up, directing, and mailing the same with my own hand to the clerk of the court for which the same was taken.

And I further testify that I am neither of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto subscribed my name and affixed my seal this seventeenth day of November, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

GEO. W. MORELL,

United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of George W. Morell, whose name is subscribed to the preceding deposition and certificate, and that the signature to the same is in his proper handwriting.

And I do further certify that he was, at the time of signing the same, a commissioner duly appointed by the circuit court of the United States of America for the southern district of New York, second circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court this seventeenth day of November, in the year of our Lord one thousand eight hundred and sixty, and of the independence of these United States the eighty-fifth.

KENNETH G. WHITE, *Clerk.*

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

I, Henry W. Fuller, clerk of the circuit court of the United States for the first circuit, Massachusetts district, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of Edmund Kimball, appellant in admiralty, *vs.* Part of the Cargo of the Ship Anna Kimball, in this court determined, including all the evidence filed therein.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at Boston, in said district, this thirtieth day [SEAL.] of November, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

H. W. FULLER, *Clerk.*

Supreme Court of the United States.

No. 89.

ALEXANDER DUNCAN ET AL.

CLAIMANTS AND APPELLANTS.

vs.

EDMUND KIMBALL,

LIBELLANT AND APPELLEE.

ABSTRACT OF PLEADINGS.

BRIEF FOR THE APPELLANTS.

BOSTON:
ALFRED MUDGE & SON, PRINTERS, 34 SCHOOL STREET.
1865.

Supreme Court of the United States.

No. 89.

ALEXANDER DUNCAN ET AL.

CLAIMANTS AND APPELLANTS,

vs.

EDMUND KIMBALL,

LIBELLANT AND APPELLEE.

ABSTRACT OF PLEADINGS.

The libel is brought by the owner of ship "Anna Kimball" against a part of the cargo brought in her from Calcutta to Boston, to enforce an alleged lien thereon for the payment of the balance due upon a charter of said ship made between the owner and Messrs. G. T. & W. P. Lyman.

The answer denies that by the terms of the charter party the ship owner had a lien upon the merchandise laden on board for the payment of the portion of the charter money claimed. It alleges a payment on account thereof by the Messrs. Lyman of $10,000, August 31, 1857, in six months' notes, and that if said notes shall not be considered as payment, yet the receipt of these notes amounted to that extent to the waiver of any lien, if any existed under the charter.

BRIEF FOR THE APPELLANTS.

1. The controversy in this case was caused by the failure of the Lymans. By their insolvency the appellants will be large losers whatever may be the result of this suit, since the goods discharged of freight, were insufficient to pay their advances.

The question whether the appellee will be a loser, will depend upon his success in establishing the lien upon these goods which he sets up in his libel. In considering this question, the natural order would seem to be first to ascertain whether by the terms and true construction of the charter party, the appellee had a lien upon these goods for the payment of the charter money to be paid here; and secondly, if he had, whether by any acts of his he has waived or lost this lien.

2. In considering the first question, it is proposed to call attention at the outset to certain well established rules which regulate the construction of contracts of this description, and which aid and govern courts in determining questions of this nature when they arise.

a. In a recent decision of this Court, Mr. Justice Wayne says, "that a charter-party is an informal instrument as often as otherwise, having inaccurate clauses, and that on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and the usage of trade."

Raymond *vs.* Tyson, 17 How., on p. 59.

b. In the same case it is also said that the lien of the ship owner for freight or hire "may be considered as having been waived without express words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of the lien or where it can be fairly inferred that the owner meant to trust to the personal responsibility of the charterer."

See also Drinech *vs.* Corlett, 12 Moore, P. C. 199.

c. This question is not affected by the fact that at the time of the failure to pay the freight or charter money, the goods do or do not happen to be in the possession of the master at the port of discharge. If upon the face of the charter party, the terms are such as, by a true construction thereof, to be inconsistent with the idea that the parties intended a lien, then the

mere fact that at some time during the continuance of the charter, goods are at a port of delivery in the possession of the master when charter money is due will not give a lien.

Raymond *vs.* Tyson, 17 How. on p. 67.
Kirchner *vs.* Venus, 12 Moore, P. C. 361.
How *vs.* Kirchner, 11 Moore, P. C. 21.

d. Neither will the subsequent insolvency of the charterer create a lien not given by the charter, or restore a lien once waived or lost. In fact, in all the cases where this question has arisen, it will be found, as in this case, that the bankruptcy of the charterer led to the litigation.

"It was however further urged by the plaintiff that the insolvency of the Collinses might make a difference. Such claims are seldom made, and *seem to be of no use*, unless insolvency has intervened," &c., were the remarks of Judge Williams in the case of

Pitney *vs.* Wells, 10 Conn. 104 on p. 119.

In a case like this, where insolvency had given rise to the litigation, Chief Baron Pollock said, "Did the owner intend to abandon his lien and receive payment of the freight two months after the inward report, or did he mean to retain his lien, and keep his right to refuse delivery of the cargo until the freight was paid? If the ship owner could not have refused to deliver the goods *provided the charterer had continued solvent*, he cannot maintain that claim now."

Alsager *vs.* The St. Katherine Dock Co. 14, M. & W. 794.

e. It is in the light of these well settled rules that the true construction of this charter must be sought.

By the terms of the charter party, the charterers may elect to send the ship from New York to Melbourne, thence to Manilla or Calcutta, thence to Boston or some port in England, paying therefor a round sum named for each voyage respectively, or

they could have her on a monthly charter not to exceed eighteen months, at the rate of two thousand dollars per month.

The stipulation in regard to the delivery of the cargo was as follows: "It is also further understood and agreed, that the cargo or cargoes shall be received and *delivered within reach of the ship's tackles* at the ports of lading and discharging."

Black *vs.* Rose, 10 Jur. N. S. 1009.

The only provisions for the payment of the charter money are that the owner is to take all the outward earnings at Melbourne after deducting eight thousand dollars advanced here on account of the charter in six months' notes. The balance of the charter is payable *one-half in five and one-half in ten days after discharge of homeward cargo.* This, as will be seen, was equivalent to making the balance of the charter payable *one-half in thirty-five and one-half in forty days after the ship's arrival.*

The question is whether these terms are or are not inconsistent with the existence of a lien after the delivery of the cargo at Melbourne, upon goods thereafter to be shipped. This question will first be considered, irrespective of the clause at the end of the charter binding the goods and merchandise, &c., and then the question whether the result thus arrived at would be or ought to be affected by that clause will be examined.

a. It is submitted that the express stipulation that the cargo should be *delivered within reach of the ship's tackle,* settles the question of the right of retaining the cargo to enforce this lien, which retention involves the unloading and storing of the cargo.

4. But independent of this express stipulation, it is submitted that the credit given for the payment of the balance of the charter money after discharge at the home port, is inconsistent with the existence of a lien and the discharge of said ship and the delivery of the cargo according to the usual and customary manner.

a. This clause giving this credit was inserted *for the benefit of the charterers.* It is not merely a formal part of the charter,

but is a live, active provision having special reference to the real contract intended to be made, and it is submitted that such a construction must be given to this charter as shall make this clause operate as a beneficial credit. See remarks of Baron Bramwell in

Foster *vs.* Colby, 3 H. & N. 704 on p. 715.

b. It is further submitted that by the true construction of this charter, the parties intended that the cargo should be discharged and delivered in the usual and customary manner. If then, the retention of the cargo for the purpose of retaining a lien thereon until the expiration of the credit, will prevent the discharge and delivery of the cargo in the usual and customary way, such retention cannot be authorized.

Foster *vs.* Colby, 3 H. & N. 704.
Alsager *vs.* St. Katherine Dock Co., 14 M. &. W. 794.

c. The character of an East India cargo is well known. The witnesses for the appellee say about thirty days would be required for discharging the cargo after the arrival of the vessel. The usual and customary course is to give notice to the consignee or owner of the goods when his goods are to be discharged, and then to discharge them upon the wharf, when the liability of the carrier as such ceases, and the goods are at the risk of the owner.

Richardson *vs.* Goddard, 23 How. 28.
The Grafton Olcotts Adm. R. 43.
Houlden *vs.* The General Steam Nav. Co., 3 Foster & Finlason, 170.
Black *vs.* Rose, 10 Jurist, N. S, 1009.
Merritt's Depo., Int. 12, p. 16.

d. It may be said that by tendering the freight or charter

money, the goods could be had: but this would merely defeat the whole object of this clause and deprive the party of any real benefit from the credit to be given.

c. To give full effect to this credit and preserve the lien, the master must have discharged his cargo and stored it, no matter how many different sub-freighters there may have been, to retain it as warehouseman and not as carrier for different periods of time, varying from ten to thirty-five or forty days until the expiration of the ten days' credit.

d. It is true that the bills of lading in this case other than those running to the appellants were for a specified rate of freight having no reference to the charter, and if made to parties ignorant of the charter party, would entitle them to receive their goods upon tender of the amount named in the bill of lading, yet the reception of this freight money by the ship owner before the expiration of the credit, would be contrary to the terms of it.

e. It is submitted that by the true meaning and construction of this contract, *and if the charterers had remained solvent*, it would have been so carried out, the charterers were to have this credit to enable them to turn round; that is, they were to have this time to collect such freight, if any were coming from sub-freighters, and to sell such of the cargo as was on their own account, before being called upon to pay freight. As before seen this credit was practically a credit of thirty-five days for one-half and forty days for the other half of the balance of the charter money after the arrival of the ship, and if the lien was to be enforced none of the goods could be demanded until after the expiration of the forty days although one-half of the charter money must be paid in thirty-five days.

f. That the question of lien or no lien is not to be affected by the subsequent insolvency of the charterers has already been considered, and the authorities cited.

g. If the charterers had elected to send the ship to a port in England to discharge, and this question had arisen there, it

would have been decided adversely to the alleged lien according to the well-settled English decisions.

Foster *vs.* Colby, 3 H. & N. 704.
Alsager *vs.* St. Katherine Dock Co., 14 M. & W. 794.
Kirchener *vs.* Venus, 12 Moore, P. C. 361.

h. It is true that in the first two cases cited the period of credit fixed in the charter parties was two months from the date of reporting, whereas, in the present case, it is only forty days from arrival; but nothing can turn upon that, for, in each case, all the cargo would have had to be warehoused before the credit expired, and most, if not all, of the real inconvenience would occur in the one case as in the other. It is submitted that the true rule is this: that if credit be given for the charter money, and that credit is inconsistent with the existence of a lien and the delivery of the goods in the usual and customary manner, or within the usual and customary time, then such credit is as fatal to the existence of the lien as if it had been made to run for a time subsequent to the delivery of the goods.

5. It appearing then that a credit was given to the charterers for the payment of the balance of the charter money, which would prevent the delivery of the goods in the usual and customary manner, and within reach of the ship's tackle as provided in the charter party, the usual printed clause at the end found in nearly all charter parties, agreeing among other things to bind the freight and merchandise to be laden on board to a performance of the contract, has no application to this part of the contract. As was said by Baron Bramwell, in a similar case, "The true meaning [of that clause] is, that he is to have a lien so far as a lien is possible." Baron Watson, in the same case, said, in reply to the argument that this clause gave an absolute lien on the cargo, "It is impossible there can lien for money not due." And again, "If the vessel is discharged abroad, the freight is 'to be paid in cash on right delivery of the cargo.' The clause giving a lien would attach in that case.

The true meaning is, that wherever there can be a lien the ship-owner is to have it," &c.

So in this case, the clause giving a lien would attach to the outward freight and to demurrage (Charter Party, p. 3, 4).

Foster *vs.* Colby, 3 H. & N. pp. 716, 718.

The case of "The Volunteer" is clearly distinguishable from this. There the freight was payable "within ten days after the schooner's return to Boston." It appeared by the duty collection list that the time for entering at the Custom House was such that the Mr. Justice Story found "that an *unlivery* could be rightfully postponed beyond the ten days after the return of the ship, when by the terms of the charter party the freight would become due."

The Volunteer, 1 Sumn., on p. 570.

The case of Certain Logs of Mahogany is peculiar in itself and can well stand upon the facts found by Mr. Justice Story from the evidence that it was agreed that the cargo should be subject to the lien for freight notwithstanding the provision making the freight payable in five days after her discharge. If in this case, as in the case of "Bags of Linseed," there had been an express stipulation that the credit given was not to impair the ship-owner's lien for freight, undoubtedly the master could have retained the goods for the preservation of the lien.

Certain Logs of Mahogany, 2 Sumn. on p. 602.
Bags of Linseed, 1 Black. on p. 109.

II.

The next question to be considered is the effect upon the lien of the two notes of $5,000 each, received by Kimball, August 31st, 1857, on account of the charter of the ship, with an agreement on his part that insurance should be effected on this

amount at his expense. It is proposed to consider this question, in the first place, as it is presented upon paper "A," annexed to the "agreed facts" (p. 10); and then to see whether the result arrived at can be and is controlled by parol evidence.

It is agreed that the notes were received for the purpose named in the paper signed by Kimball, of which the following is a copy:

"Boston, August 31st, 1857.

"Received of G. T. & W. P. Lyman their two notes (of $5,000 each,) amounting to ten thousand dollars, of this date, payable in six months, to my order, on account of charter of ship 'Anna Kimball.' It is understood that this amount is to be insured by G. T. & W. P. Lyman, and charged to owners of ship.

(Signed) "EDWARD KIMBALL."

It is further agreed that Kimball procured these notes to use, and did obtain money upon one of them at a bank where he was a director, and where he had a standing account. Also, that "The Messrs. Lyman effected insurance on these amounts, in pursuance of the agreement, paying therefor $415.20."

Agreed Facts, p. 9.
Amended Agreed Facts, p. 14.

1. The question presented upon the face of the paper "A" is, are these notes given by the Lymans to be treated as an advance made by them on account of the charter money, which advance was thenceforth to be at their risk, so far as the perils incident to the voyages contemplated by the charter were concerned—because, if this be so, it is submitted that it is well settled that such an advance displaces the lien.

a. While it is undoubtedly true that the doctrine of this Court, of that of many of the State Courts, and of the Courts of England, in regard to the taking of a promissory note as to its effect upon the original debt differs from that of the Courts

of Massachusetts, yet it is equally true that it will be treated by all Courts, everywhere, as payment where it appears that the parties so intended it.

b. So it is also true that the doctrine of the English courts, and of that of some of the States, differs as to the effect of a pre-payment of freight or charter money. In England, it is held, where money or paper is thus advanced, that it is a payment which is thenceforth at the risk of the shipper or charterer, which risk he may insure against, unless it is made to appear that the advance was merely intended as a loan. In several of the States the contrary doctrine is held; but it is everywhere held that if the parties intended such advance, whether of money or notes, as a payment which was thereafter to be at the risk of the shipper or charterer it will be so treated.

Silvale *vs.* Kendall, 4 M. & S. 37.
Saunders *vs.* Drew, 3 B. & Sa. 445.
Samson *vs.* Ball, 4 Dall. 459.
Watson *vs.* Duynick, 3 Johns, 335.
Brown *vs.* Harris, 2 Gray, 359.

c. The question whether the shipper or charterer has or has not an insurable interest in any such advance is everywhere held to depend upon whether, in any particular case, such advance is to be considered as a pre-payment of freight, which is thenceforth at the risk of the shipper, or a mere loan. In the former case he has an insurable interest; in the latter he has not.

Manfield *vs.* Maitland, 4 B. & Ald. 582.

d. Upon this state of the law, it is submitted that it is well settled, where an advance is made upon freight or charter-money,

in money or notes, with an agreement that the advance is to be insured for or by the shipper or charterer, that such advance shall be treated as a pre-payment of freight, at the risk of the shipper, which, to the extent of it, discharges the lien.

Hicks *vs.* Shield, 7 El. & Bl. 633.
Jackson *vs.* Isaacs, 3 H. & N. 405.
Trayes *vs* Worms, 12 L. T. N. S. 547.
Tolmaco *vs.* Simpson, 13 L. T. N. S. 160.

e. Notes on six months for eight thousand dollars were given by the charterers when the charter-party was executed, and the same provision was therein inserted in regard to insurance as was made in regard to the ten thousand dollar notes now in question. If the charterers had failed before the note for eight thousand dollars had matured, those notes, according to the decision in Hicks *vs.* Shield, would nevertheless be considered as payment, and the lien of the ship-owner to that extent would have been lost. It is difficult to see why the same rule does not apply with equal force to the second advance of notes under the same agreement to insure.

Charter-party, pp. 2, 3.

2. Whether these notes are to be considered as payment or not, it is well settled that no action could be brought on the original debt until their maturity, and the taking of these notes was tantamount to an agreement on the part of Kimball to give the Lymans a credit of six months from August 31st for that amount of the charter money.

Belsham *vs.* Bush, 11 Common Bench, 191.
Price *vs.* Price, 16 M. and W. 239.
Wheeler *vs.* Schroder, 4 R. I. 383.

a. There was nothing in the notes or in the agreement given by Kimball on the receipt of them, by which the time when the notes were to mature in any way referred or related to the time of the arrival and discharge of the ship.

b. The notes matured March 3d, 1858. The ship arrived here January 23, and was fully discharged Feb. 22 or 23. On her voyage home the ship was injured, and was obliged to put into a port of distress, have part of her cargo discharged and repairs done upon her, and, as alleged in the libel, she "was there detained a long time" (Paragraph 6, p. 2). So that but for the accident, unknown when these notes were signed, she would have been here two or three months before their maturity.

Agreed Facts, p. 9.
Libel, paragraph 2, p. 1.
Depo. of Rhoades, Int. 16, p. 39.

c. But for the accident to the ship she would have, in fact, been here two or three months before the maturity of the notes. The length of a voyage of that distance must of necessity vary very materially, and where a ship-owner gives credit to a fixed day for his charter-money, which may not fall within two or three months of the arrival of the ship, it is submitted that he thereby impliedly waives his lien. It has already been seen, in the cases cited, that the question of whether a lien has been waived in a particular case cannot be made to depend upon whether a certain accidental thing, over which the parties had no control, did or did not happen. Thus, in this case, the question of the right to lien cannot be made to depend upon the accident to the ship on her homeward passage, by which her arrival was made to approximate more nearly to the maturity of the notes.

d. By the charter-party the *balance* of the charter-money was payable, one-half in five days, and one-half in ten days,

after discharge of homeward cargo. With these notes outstanding, what would that balance be?

3. An attempt has been made to establish a different agreement from that which is to be found in this paper of August 31, 1857, by parol evidence, and it is submitted that that can be no more controlled or varied by parol evidence than the similar agreement contained in the charter.

a. If the appellants are right, that paper, by legal construction, amounts to an agreement that the notes are received as an advance on, or prepayment of, the charter money, and that the amount thus advanced shall be at the risk of the charterers, who are to protect themselves by insurance at the expense of the ship-owner.

b. The parol evidence sought to be introduced is offered for the purpose of showing that no such agreement was made, and that the agreement for insurance is a nullity, and it is submitted that such evidence is incompetent.

Egleston *vs.* Knickerbacker, 6 Barb. 458.
Tisloe *vs.* Graeter, 1 Blackf. 353.
2 Parsons on Contracts, (5 Ed.) 555.
1 Greenl. Ev. § 305.

4. If, however, such evidence be competent, it is submitted that the burthen of proof is upon the libellant, to show that the agreement was other than such as the law would infer from the paper signed by him, and that he has not sustained it.

a. In examining and weighing the testimony, it will be well to bear in mind the circumstances under which it was introduced.

b. In the District Court the parties agreed the facts, and, among other things, agreed that "The vessel arrived in Boston on the 23d January, 1858, having been expected, when the said notes were given, to arrive in about three or four months." (p. 9.) Upon that clause the District Court gave a decision in favor of the claimants (p.13.) Finding where the trouble was,

the libellant, when he got into the Circuit Court, had the agreed facts discharged (p. 4), and then attempted to shape his testimony to cover up the weak spot. Subsequently, all of the original "agreed facts" were restored except the obnoxious clause. (p. 14.)

c. The only testimony introduced by the libellant comes from his broker, Jerome Merritt, and one of the charterers, Wm. P. Lyman.

The state of Merritt's mind, in giving his testimony, will be readily perceived by comparing his answers in his direct and in his cross-examination. By such comparison it will be found that in his answers in the direct examination he does not state what he recollects of what occurred at the time those notes were given, but gives, in form, as if it actually occurred, what, in the light of the decision of the District Judge, he now feels ought to have been in the minds of the parties when the transaction took place. Thus, if his answer to the 5, 15 to 27 direct (pp. 16, 17 and 18,) be compared with his answers to the following cross-interrogatories, 3 to 16 (pp. 18 and 19,) 34 to 57 (pp. 20, 21 and 22,) it will be found that all he does testify to, which is competent, — all that he really recollects of what occurred in regard to the notes, — is, that upon application to Mr. Kimball to obtain an alteration of another charter, Kimball asked him to get these notes of the Lymans, and that he did so. Beyond that, the testimony is simply of what he understands the arrangement to have been, and that a present understanding, and not a recollection of what he understood at the time the transaction took place.

The cross-examination was taken *de bene esse*, and the appellants still insist that the objections taken by them to the various interrogatories and answers are well taken, and that the questions and answers objected to should be excluded, and this applies to the objection to all the depositions.

William P. Lyman, one of the charterers, does undertake to testify to some sort of understanding in regard to the time when these notes should mature with reference to the arrival of the ship, but in this he is flatly contradicted by his brother, George T. Lyman, with whom Merritt says he carried on the negotiations. (Merritt, cross-ints. 31, 34, p. 20.) His statements in regard to the maturing of the notes are inconsistent with his statement that his agent had not then decided what to do with the ship. (Int. 11, p. 24.) She might have taken a monthly charter, or made a port in England her home port, in which latter case, the *place* as well as time of payment would have made the giving of these notes inconsistent with the retention of the lien.

It is very evident that at the time when the notes were given to, and the receipt and agreement taken from Mr. Kimball, nothing was said not covered by it. Cross-Interrogatories 20 to 26 (p. 28).

Mr. George T. Lyman testifies that although the application may have been first made to his brother, that the matter was arranged and decided by him. He says that at the time these notes were given, his latest advices from the vessel were about the first of July, when she was in Calcutta; that she had then less than twenty lay-days remaining, and that his instructions were to have her loaded within her lay-days. That when he received these advices he expected her here in four months. That nothing was said about these notes maturing about the time of the arrival of the ship; on the contrary, the credit obtained beyond her arrival was the inducement for advancing the notes.

G. T. Lyman's deposition, pp. 43 and 44.
Merritt's deposition, Cross-Interrogatory 74, p. 23.

d. The testimony of G. T. Lyman is supported by all the probabilities of the case. The facts show that the Lymans were engaged in the East India trade, and were merchants in good credit (Merritt, cross-int. 45, p. 21); that Kimball had already taken notes from them; and the agreed facts show that the notes in question were wanted by Kimball for use. No merchant desires to put his paper into the market without consideration, and the consideration in this case was the extra credit. The talk about alteration of another charter amounts to nothing. Merritt himself says that the alteration would have been made if the notes had not been given. (Re-cross 1, p. 24.)

e. The attempt made to bridge over the time by getting two or three witnesses, one of whom at least is not an expert, to state how long a vessel might be in loading, sailing, and discharging, are in actual conflict with the facts which occurred in this case; and it is for that reason undoubtedly that resort is had to this sort of evidence instead of the advices which Kimball must have received from his captain, and the testimony of the captain himself.

f. It is submitted that upon the whole testimony the libellant has failed to prove that the agreement was different from the one set out in writing.

5. If the Court shall be of opinion that the owner had a lien under the charter, but that to the extent of the notes he has lost it, and shall order judgment for the balance, as in the District Court, it is submitted that such judgment should not merely be without costs, but that costs should be awarded the appellants, inasmuch as it appears by the agreed facts, that they were willing to pay this balance to avoid trouble and litigation.

Agreed Facts, p. 9.

D. THAXTER,
For Appellants.

Supreme Court of the United States.

THE ANNA KIMBALL.

EDMUND KIMBALL, Libellant.

ALEXANDER DUNCAN ET ALS., Claimants.

BRIEF OF COUNSEL FOR LIBELLANT.

BOSTON:
PRINTED BY ALFRED MUDGE & SON, 34 SCHOOL STREET.
1865.

Supreme Court of the United States.

THE ANNA KIMBALL.

EDMUND KIMBALL, LIBELLANT.

ALEXANDER DUNCAN ET ALS., CLAIMANTS.

BRIEF OF COUNSEL FOR LIBELLANT.

I. The Charter Party [Record p. 2] is of the kind that retains to the owner a lien on the cargo, by its general terms.

Volunteer, 1 Sumner, 551.
Gracie vs. *Palmer*, 8 Wheaton, 601.
Faith vs. *E. I. Co.* 4 B. & Ald. 630.
Christie vs. *Lews*, 2 Br. & B. 410.
Logs of Mahogany, 2 Sumner, 589.
Tate vs. *Meek*, 8 Taunton, 280.
Raymond vs. *Tyson* (The Orphan,) 17 How. 53.
Clarkson vs. *Edes*, 4 Cowen, 470.

There is always a strong presumption that the owner of a vessel does not intend to relinquish his lien.

Logs of Mahogany, 2 Sumner, 589.
Raymond vs. *Tyson* (The Orphan,) 17 How. 53.
3 *Kent's Comm.* 284, 5 [221, 2].

II. The provision in this charter [Record p. 3] — "balance of charter payable one-half in five and one-half in ten days after discharge of homeward cargo," is not inconsistent with the owner's retaining and exercising his lien.

The test is whether the owner can be *required to deliver* the cargo before the consignee can be required to pay freight.

The provision is for the benefit of the charterer, and he can waive it and take his cargo short of the time specified, if the master is ready to deliver it, and the charterer (or consignee) is ready to pay the freight. Or, as is usual, the parties may co-operate in any new arrangement.

The reason for the provision is that some cargoes, and especially, on this evidence, Calcutta cargoes, often require careful examination on each side to discover injuries and their causes, and this can only be done after the discharge of the cargo. The provision settles a time before which the consignee cannot be required, and after which he can be required to decide whether to take the goods and pay the freight, or to decline to receive them, or on whatever other course may be open to him as to payment of freight.

The time fixed upon in this charter is not unreasonable for that purpose.

Treasurer. Sprague, 473.

In such a state of things it is not necessary to infer a waiver of the lien.

Raymond vs. *Tyson* (The Orphan). 17 How. 53.
Logs of Mahogany, 2 Sumner, 487.
Volunteer, 1 Sumner, 551.

The effect of the clause is that there is no default entitling the owner to enforce his lien, unless the consignee fails to pay on the day named. If the owner delivers any cargo before the day named, he loses his lien on what he so delivers. He cannot be required to deliver until the day named, unless on tender of the freight.

In this charter, after the clause referred to, there is an express pledge of the vessel to the charterer, and of the cargo to the owner, as security for the performance of all the covenants, among which is that for paying charter money. [Record p. 4.]

III. The bills of lading which the Claimants took from the Messrs. Lyman, which were their security, contained the clause "he or they paying freight for the said goods as per charter party." Both the charterers and the consignees (these claimants) knew that the charter gave a lien for freight, and intended to bring the bills of lading within the rule of the charter.

The Claimants demanded their goods "under the bills of lading" [Agreed Statement, Record p. 9,] thereby admitting their obligation to pay freight.

The Claimants, having full knowledge of the charter, and accepting bills of lading which refer to the charter, and demanding their goods under the bills of lading, are in no better condition than the charterer would be in respect to the obligation to pay freight, and the lien on their goods.

Gracie vs. *Palmer*, 8 Wheat. 601.
Small vs. *Moates*, 9 Bingh. 574.
Campton vs. *Colvin*, 3 Bingh. N. C. 17.
Gladstone vs. *Allen*, 12 C. B. 202.
Tate vs. *Meek*, 8 Taunt. 280.

The equities between the Libellant and Claimants are not equal. Each contracted with the Messrs. Lyman, who became insolvent, but the Libellant did not trust to them for his charter-money, but to his lien, while the Claimants trusted the Messrs. Lyman and the security of the pledge of the bills of lading of the goods subject to the lien. The Libellant, moreover, has enhanced the value of the Claimants' goods, by transporting them in his ship at his expense.

~~The agreement upon two days, the 5th and 10th after discharge, dividing the payments equally, has this effect, — the consignee may claim to have half his cargo delivered on the fifth day; or, at least, the owner may retain cargo enough to the tenth day to secure his lien for the second payment.~~ But it is not necessary to consider the effect of this division of payments on all the rights of the parties, as the consignees refused to pay even the first one-half of the charter-money due, and that, even if the Libellant had delivered to them their entire shipment. [Answer, Record, p. 6. Agreed Statement, Record, p. 9.] The libel was not filed until the expiration of the ten days after the discharge. [Agreed Statement, Record, p. 9.] The case presents no other question, on this head, than whether such a clause has, in itself, the effect of waiving the lien, whatever the facts and the acts of parties to which it is to be applied.

IV. The notes given in this case, [Agreed Statement, Record, pp. 9, 10,] were not, in law, payment. By the general commercial law of the United States and Great Britain, they are presumed not to be payment. The *onus* to prove them payment is on the Claimants.

Lyman vs. *Bank of United States*, 12 How. 225.
Downey vs. *Hicks*, 14 How. Language of Court on p. 249.
Clark vs. *Mandell*, 1 Salk. 124.
Peter vs. *Beverly*, 10 Pet. 532, 567.
2 *Kent's Comm.* 106, n. 3.
Story's Prom. Notes, §§ 6, 104, 105, 404, 435.

By the local law of Massachusetts, notes are only primâ facie payment, and the presumption is rebutted if the taking them as payment would be a relinquishment of security.

Butts vs. *Deane*, 2 Met. 76.
Mellege vs. *Boston Iron Co.*, 5 Cush. 158.
Page vs. *Richardson*, Sprague, 335.

This case being one of general commercial law is not governed by the local law of Massachusetts.

Mullar vs. *Austin*, 13 How. 218.
Homer vs. *Brown*, 16 How. 354.
Swift vs. *Tyson*, 16 Pet. 1.
Carpenter vs. *Pr. I. Co.*, 16 Pet. 494.
Foxcroft vs. *Mallett*, 4 How. 393.
Rowan vs. *Runnels*, 5 How. 134.
Williams vs. *Suffolk Co.*, 3 Sumner, 277.
Gloucester I. Co. vs. *Younger*, 2 Curtis, 332.
Gelpecke vs. *Dubuque*, 1 Wallace, 175.

The Receipt (Record p. 10) is not for payment, but a special one, showing that the notes are connected with the cargo, and on account of a contingent debt.

The notes were given for a contingent debt, dependent on arrival of the vessel. If the vessel did not arrive, the Messrs. Lyman could recover back the notes or their payment if paid.

Brown vs. *Harris*, 2 Gray, 359.
Pitman vs. *Hooper*, 3 Sumner, 50.
Griggs vs. *Austin*, 3 Pick. 20.
Cope vs. *Dodd*, 13 Penn. 33.
Phelps vs. *Melvans*, 15 Sandf. 578.
Watson vs. *Duykinck*, 3 Johns. 335.

It would be inequitable to hold the notes payment, for it would enable the owner, in case of loss, to get his charter money without performing the service. It would enable the charterer, if the vessel arrived, and he should be insolvent, to escape paying for the service the ship rendered, while his creditors would get the benefit of the ship's service.

Even if the notes were in any sense payment, the insolvency enables the holder to tender them back, and resort to his lien.

Arnold vs. *Delano*, 4 Cush. 33.
Feiz vs. *Ray*, 3 East. 93.
Miles vs. *Gorton*, 2 Cr. & R. 504.
Stevenson vs. *Blake* 1 M. & S. 535.
Exparte Lorsing, 1 Rose 19.
Grant vs. *Mills*, 2 V. & B. 300.
Campbell's opinion in 17 How. 70 *Raymond* vs. *Tyson*.

The evidence shows, satisfactorily, that the parties did not intend to treat the notes as payment, or as a waver of the lien, but as an accommodation to Mr. Kimball.

W. P. Lyman, [Record p. 24–34].
J. Merritt, [Record p. 15, 24].

And calculated the time so as to make the notes fall due at the same time with the freight.

W. P. Lyman, Record p. 24–34.
J. Merritt, 15–24.
J. Hurley, 40–42.
W. S. Rhoades, 38–40.
C. Marsh, 37, 38.
J. R. Kimball, 35–37.

ssion of the
e libel is not

The clause in the Agreed Statement respecting the time in which the ship was expected to arrive, [Record p. 9] was discharged on full consideration by the Court. [Record p. 14.] Mr. Kimball had the notes in his possession and tendered them to the Messrs. Lyman before the assignment in insolvency took effect; and when the ship arrived, again offered to deliver them up, and has always been ready to give them up.

Agreed Statement, [Record p. 9].

The counsel for the libellants ask leave to refer the Court to the opinion of the learned Judge of the Circuit Court in this cause, appended hereto as part of their argument.

B. R. Curtis for Appellee

THE ANNA KIMBALL'S CARGO.

KIMBALL, *Libellant.*

DUNCAN *et al, Claimants.*

CLIFFORD, J. This is an appeal in Admiralty from a decree of the District Court of the United States for this District. Libellant is the owner of the ship Anna Kimball, and he alleged in the libel that on the fourth day of July, 1856, he made a contract of affreightment with G. J. & W. P. Lyman, by which they agreed to pay him thirty-five thousand seven hundred and fifty dollars for a round voyage from New York to Melbourne, thence to Calcutta, and thence to Boston, and that by the contract the cargo laden on board became pledged to him for the payment of that sum, and that he became entitled to a lien thereon by the Admiralty and maritime law. Performance of the voyage is also alleged, and the arrival of the vessel on the 23d January, 1858, at the return port with her homeward cargo on board. Eight thousand dollars of the charter money, it is admitted, were paid in advance, — and that a further sum of eight thousand dollars was paid in Melbourne and Calcutta, — leaving due as claimed, the sum of nineteen thousand seven hundred fifty dollars, which, it is alleged, was payable one-half in five days and the rest in ten days after the discharge of the homeward

Full discharge of the cargo from the vessel, due demand of the residue of the charter money, are also duly alleged by the libellant. He also alleges that the ship met with severe weather on her voyage from Calcutta to Boston and, receiving injury by perils of the seas, was obliged to put into the port of Mauritius for repairs and was there detained for a long time and put to large expenses, and that the portion of the expenses which falls upon the cargo, and for which he has a lien, is three thousand dollars.

On the 13th of May, 1858, the claimants filed their answer, in which they allege that they are the true bona fidè owners of the merchandise described in the libel. They admit the contract of affreightment, that the charterer agreed to pay the sum mentioned in the libel for the voyage therein described, but deny that, by the true construction of the contract, the cargo became pledged to libellant for the payment of the charter money, or that he became entitled to a lien thereon as alleged in the libel. Due performance of the homeward voyage is denied, and the respondents also deny that the vessel fully discharged the cargo, but allege that she delivered only a part of the same, and that some of the goods delivered were in a damaged condition. Payments are also set up in the answer in addition to those admitted in the libel. Of these, two hundred and fifty dollars, it is alleged, were paid at Melbourne and Calcutta, to be added to the sum mentioned in the libel, and they also allege that ten thousand dollars were paid to libellant in Boston in the month of August, prior to the filing of the libel — and the further sum of four hundred and fifty dollars and twenty cents for insurance; and that he has collected of the freight and now holds the sum of seven thousand two hundred and ninety-seven $\frac{50}{100}$ dollars, leaving a balance of seventeen hundred and eighty-seven dollars and thirty cents and no more, which would remain due if the vessel had fully delivered the homeward cargo. Demand of the goods by the agent of the owners, after discharge, is also alleged in the answer, and the respondents also allege that the libellant refused to deliver the same unless the balance of the charter money as claimed in the libel was paid, and that he has ever since refused to deliver the goods.

Certain other defences are also set up in the answer which need not be specially noticed at the present time, except that the portion of the general average which falls upon the goods described in the libel is not

more than $2200. Certain material facts were agreed between the parties in the District Court, and after a full hearing a decree was entered in favor of the libellant, for the sum of $2500. Appeal from that decree was taken to this court by the libellant. Motion was made in this court by the libellant on 12th November, 1860, that the agreed statement of facts filed in the District Court be discharged on account of an alleged error in the statement, and, after hearing the parties, the motion was granted, upon the condition that the libellant pay all taxable costs to that time, and recover none prior to that time in case his appeal is sustained. Since the agreed statement, filed in the District Court, was discharged in this Court, the parties have entered into a new stipulation agreeing that all of that statement is correct except a part of a paragraph on the thirteenth page of the record. Omitting the part stricken out the residue reads, "The vessel arrived in Boston on 23 January, 1858," and it must be understood that none of the rest of the paragraph is any part of the agreed statement.

The charter party shows that the ship was chartered as alleged in the libel. By the terms of the charter party the owner was to make the necessary repairs and provide the vessel with every requisite and with men and provisions necessary for the voyage, and also to ballast the ship at the outward port. He argued that the whole vessel, with usual exception of the cabin or room in the cabin for the master and other officers, and room also for the accommodation for the crew and the storage of the sails, cables and provisions should be at the sole use and disposal of the charterers, and he also engaged to take and receive on board the vessel during the voyage all such lawful goods as they might think proper to ship.

In consideration whereof, the charterers engaged to charter and hire the vessel, and furnish her with a full cargo. On their part, they also agreed to pay, for the charter of the vessel $34,750, for the voyage described in the libel, or $35,750 if to Calcutta and back to Boston; or, if to a port of discharge in England, $37,750 and all inward port charges. They were to advance funds at Manilla and Calcutta, and pay all port charges at those ports; and they accordingly paid in Australia and at Calcutta the sum of $8,250; $8,000 was to be advanced by them on account of the charter, in notes payable in six months, and the agreed statement, taken in connection with the charter party, shows that

the advance was so made, and that the owner effected insurance, as he agreed to do, on that amount. The balance of the charter was payable one-half in five, and one-half in ten days after discharge of homeward cargo. Two other notes, each for the sum of $5000, were also received by the owner of the vessel from the charterers. Those notes were dated 31st August, 1857, and were payable to the order of the owner in six months, and the case shows that he received the notes at his own request, and that he gave a receipt for them to the charterers, stating that the notes were received on account of the charter of the ship, and that the amount was to be insured by the charterers and charged to the owner of the ship. He procured those notes, as the case shows, to use, and obtained money on one of them at a bank where he was a director, and where he had a standing account. The charterers subsequently failed, and, on January 19, 1857, took the benefit of the Insolvent Law of the State. After the failure, and before the publication of notice, the libellant tendered back the notes to the charterers, and they refused to receive them, and the libellant has always been ready to give up the notes. The contract between the claimants and the charterers was in writing, and the goods libelled were purchased by the agent of the charterers in Calcutta, upon credits furnished by the claimants in pursuance of that written agreement. The freight due from the sub-freighters, amounting to about $7000, has been collected by the libellant, which, when the amount is exactly ascertained, is to be deducted from the charter. Demand of the cargo, under the bills of lading, was duly made by the claimants on the arrival of the vessel, but the libellant refused to deliver it, claiming a lien on the cargo for the unpaid balance of the charter without deducting the amount of the notes tendered back. To get possession of the cargo, the claimants were willing to pay the balance if the notes were deducted, but would make no offer of payment unless that deduction was made, and the libellant tenders the notes in Court.

1. Performance of the voyage as described in the libel is admitted, and it is also admitted that the charterers have failed to pay the balance of the charter money. On that state of the case the owner of the ship seeks, in this suit, to recover the amount of the unpaid balance from the cargo of the homeward voyage, upon the ground that he has a maritime lien on the same for the payment of the charter money. As

the consignees of the cargo sought to be charged, the claimants resist the claim and insist that the terms of the charter party in this case created no lien in favor of the owner of the ship, and if it did, that the lien has been displaced by his own acts, at least to the amount of the notes specified in the receipt. They do not controvert the position assumed by the libellant, that in general, the owner, in such cases, has a lien on the cargo for the freight, and they admit that the lien is one that is favored by the Courts, and will be enforced unless clearly displaced by the acts or agreements of the parties. Conceding all that, still they assert that the clause of the charter party providing that the "balance of charter [was] payable one-half in five days and one-half in ten days after discharge of homeward cargo" is inconsistent with the retention of the lien upon the cargo for the payment of that balance. Charter parties may doubtless be framed with provisions so entirely inconsistent with a lien on the cargo for the freight as to defeat the implication to that effect, which would otherwise arise in favor of the owner. Whenever that suggestion is made, however, it then becomes necessary to examine the whole instrument to ascertain its true meaning and test the suggestion by comparing the parts invoked to defeat the lien with all the other parts of the instrument. Suppose the clause in question if standing alone might have the effect assumed by the claimants, which is utterly denied, still the suggestion could not prevail in this case, because upon an examination of the last clause of the instrument it will be seen that the parties in legal effect have stipulated that the ship shall be bound to the merchandise and the merchandise to the ship; so that the contract itself is opposed to the theory of the claimants. Abb. Shipp. p. 360 — Vandewater *vs.* Mills, 19 Howard, 90.

But the charter party is clearly of the class in which the owner has a lien on the cargo under the maritime law whether it be so stipulated or not in the charter party, provided it contains no provisions inconsistent with that implication in favor of the owner. Undoubtedly the shipowners, says Taney, Ch. J. in the case of Bags of Linseed, 1 Bl. 112, has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount, and as contracts of affreightment are regarded by the Courts of the United States as maritime contracts, over which the Admiralty has jurisdiction, the shipowner

may enforce his lien by a proceeding *in rem* in the proper court. Delivery, without any condition or qualification annexed, is a waiver of the lien, because the lien is but an incident to the possession, with the right to retain the thing until the interest in it or the claim upon it, is discharged. Where delivery is made, however, upon an understanding between the parties that the transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, no such consequences will follow — but a Court of Admiralty will regard the transaction as a deposit of the goods for the time, and not as an absolute delivery. Many other cases are cited by the libellant to show that the charter is of the class in which the owner retains a lien on the cargo, but it is not necessary to refer to more than one or two of them, as the recent decision of the Supreme Court recognizes the general principle for which the libellant contends, and, to that extent, is decisive of the point.

The Volunteer, 1 Sum. 551. Gracie *vs.* Palmer, 8 Wheat. 601. Assuming that proposition, however, to be correct, still it does not fully meet the difficulty suggested by the claimants. They do not controvert the position that in general a lien arises in cases of this description in favor of the shipowner, but they insist that the clause giving the five and ten days credit after discharge of the homeward cargo, is inconsistent with the retention of the lien and in fact displaces it. If the question were a new one, it would deserve more consideration than under existing circumstances it is entitled to receive. Judge Story had the same question before him in the case of certain logs of mahogany, 2 Sum. 600, and as usual he exhausted the argument upon the subject. He held that the clause was not a waiver or displacement of the lien because the word discharge refers merely to the unlading and not to the delivery of the cargo. That rule was rightly established at the time, has been constantly followed ever since, and at the close of a quarter of a century, ought not to be changed. Five and ten days "after the discharge" are the words of the charter party — and both the pleadings and evidence show that no part of the goods were delivered. Possession, therefore, is still in the libellant, and where that is so, the authorities are unanimous, that the lien is not displaced.

II. It is insisted by the claimants, in the second place, that the notes of 31st August, 1857, were received by the libellants as an

advance, and as payment of the amount for which they were given. Payment undoubtedly discharges the lien of the ship owner, and promissory notes, accepted as payment, will have the same effect as payment in money. At common law, a promissory note given for a simple contract debt, does not operate as discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears that such was the intention of the parties at the time it was given. Clark *vs.* Mundall, 1 Salk. R. 124. Downey *vs.* Hicks, 14 How. 249. Lyman *vs.* Bank of U. S., 12 How. 225. But the Courts in this State have adopted a different rule, and the question in this case must be governed by the rules of law which prevail in the jurisdiction where the transaction took place. Whenever a party bound to a simple contract debt, in this State, gives his own negotiable security for it, the presumption is, as matter of fact, in the absence of any circumstances to indicate a contrary intention of the parties, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt. Such presumption, however, is not a conclusive one, but may be controverted by any circumstances which show that such was not the intention of the parties. Fowler *vs.* Bush, 21 Pick. 230. Milledge *vs.* Boston Iron Co., 5 Cush. 170. Fowler *vs.* Ludwig, 34 Me. 461. Baker et al. *vs.* Draper et al., decided in this Court, May Term, 1860. Applying these principles to the present case, it is clear that the question presented is purely one of fact, to be determined from the nature of the transaction and all the evidence in the case. Brief references only will be made to the testimony, as it is not the intention of the Court to enter into extended argument upon matters of fact, except in cases of real difficulty or doubt. Strong doubts arise from the very nature of the transaction, whether parties, under the circumstances and at the date of the receipt, would give and receive notes in actual payment. Liability was certainly contingent, and it is more reasonable to suppose that if they had intended an actual payment, the language of the receipt would have been different. Claimants insist that the parties treated the notes as payment, but one of the charterers expressly states that the notes were given as an accommodation to the libellant, and that the agreement was, if the notes fell due before the ship got in, then the libellant was to take them up or renew them, and if the ship got in before the notes fell due, he was to return them or deduct the amount

from the charter money. Full confirmation of his statement is found in the testimony of the ship broker who made the arrangement. On the other hand, the other charterer states that the notes were given without conditions except that the libellant was to insure the amount, and have the loss payable to their firms, but he does [sic] affirm that the notes were given or received in payment, nor does he deny the agreement stated by the other charterer. These brief references will be sufficient to show the leading features of the testimony upon which the question depends.

After careful examination of the whole evidence, I am of the opinion that the notes were not given or received in payment, but as an accommodation to the libellant, and having been tendered at the trial, the libellant is entitled to recover the whole balance of the charter money, after deducting the other payments. The decree of the District Court is therefore reversed, and the cause must be sent to an Assessor to ascertain the amount.

[Copy.]

Attest:

J. W. DANA,
Reporter.